No. 93-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALVIN T. ADAMS, SR., *et al.*,

Petitioners,

v.

WALTER INDUSTRIES, INC., *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a Seventh Amendment right to a jury trial in an action to hold a parent corporation liable for money damages caused by its subsidiary's torts.

2. Whether the courts of appeals remain bound by the rule of *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962), that it is "the responsibility of the Federal Courts of Appeals to grant mandamus" to review deprivations of the Seventh Amendment right to jury trial.

PARTIES TO THE PROCEEDING

Petitioners are more than 1,000 tort victims who brought actions for money damages against Walter Industries, Inc., its subsidiaries, or predecessors for personal injuries arising from exposure to asbestos and asbestos-containing products manufactured and sold by The Celotex Corporation. They are identified in Appendix A to this petition (App. 1a). Respondents are Walter Industries (formerly Hillsborough Holdings Corporation) and some 30 corporate subsidiaries or affiliates of Walter Industries. They are identified in Appendix B to this petition. (App. 31a)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying the petition for a writ of mandamus (App. 40a) is unreported. The order of the district court denying petitioners' motion to withdraw the reference of this case to the United States Bankruptcy Court for the Middle District of Florida (App. 32a) is unreported. The order of the bankruptcy court striking petitioners' demand for a jury trial (App. 36a) is unreported.

JURISDICTION

The order of the court of appeals denying a writ of mandamus was entered on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

STATEMENT

Respondents Walter Industries, Inc., (formerly Hillsborough Holdings Corporation) and some 30 corporate affiliates of Walter Industries, are the debtors in a pending bankruptcy case. They instituted this suit as an adversary proceeding in the United States Bankruptcy Court for the Middle District of Florida. Respondents seek a judgment declaring that their predecessor, Jim Walter Corporation ("JWC"), has no liability for money damages resulting from asbestos products of The Celotex Corporation ("Celotex"), JWC's wholly-owned, and now insolvent, subsidiary.

Petitioners are defendants in the adversary proceeding. They include more than 1,000 individuals who brought suit against Celotex and JWC before respondents' bankruptcy. Those suits sought money damages for bodily injuries sustained as a result of exposure to Celotex's asbestos products.

This petition stems from rulings of the bankruptcy court and the district court that petitioners have no Seventh Amendment right to a jury trial of JWC's liability, and from the failure of the court of appeals to grant mandamus for the vindication of that right in advance of the forthcoming trial.[1]

Respondents' bankruptcy arises from the 1988 acquisition of JWC, a Florida homebuilding and building products conglomerate, by various holding companies created and controlled by Kohlberg Kravis Roberts & Company ("KKR"). KKR financed the acquisition of JWC's stock in large measure by borrowing against JWC's own assets, a transaction commonly referred to as a leveraged buyout or "LBO." Before the 1988 LBO, JWC was a public company which owned more than 30 operating subsidiaries, including Celotex. Celotex manufactured and sold products containing asbestos and, through a subsidiary, mined and sold asbestos. At the time of the LBO, well over 100,000 persons, including petitioners, had unsatisfied claims against Celotex for asbestos-related injuries (the "Asbestos Victims"). In addition, hundreds of Asbestos Victims had joined JWC as a defendant to their personal injury actions against Celotex, claiming that the corporate veil between Celotex and JWC should be pierced. The plaintiffs in those actions against JWC all demanded jury trials.

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[1] Petitioners raised this issue by moving the district court to withdraw the reference to the bankruptcy court, contending that the bankruptcy court lacks constitutional power to conduct a jury trial. As none of the lower courts found it necessary to decide whether the bankruptcy court is empowered to preside over a jury trial, that question is not presented in this petition for certiorari.

As part of the LBO, KKR orchestrated a series of complex corporate maneuvers designed to insulate the assets of JWC from claims by the Asbestos Victims. When the dust settled, all of JWC's operating subsidiaries except Celotex and one other company were owned by KKR through respondents. Celotex and the corporate successor to JWC were transferred to a third party for nominal consideration.

The Asbestos Victims responded to the LBO by adding certain of respondents as defendants in many of the pending personal injury lawsuits against Celotex and JWC, alleging, *inter alia*, that the LBO was a fraudulent conveyance of JWC's assets to respondents. In addition, in January 1989, certain Asbestos Victims filed a class action complaint in the United States District Court for the Eastern District of Texas seeking money damages from, among others, Celotex, JWC and Walter Industries. In that suit, *Cimino, et al. v. Raymark Industries, Inc., et al.*, the plaintiffs asserted that JWC was liable for asbestos injuries caused by Celotex on a theory of piercing the corporate veil. They also alleged that respondent Walter Industries was liable for such injuries because the 1988 LBO was a fraud on the creditors of Celotex and JWC. The *Cimino* plaintiffs demanded a jury trial.

Later in 1989, a second class action was filed in Texas state court by some of the Asbestos Victims. In that suit, *Larned, et al. v. Kohlberg Kravis Roberts & Co., et al.*, the plaintiffs sued Celotex, JWC, certain of respondents, KKR and others associated with the 1988 LBO. As in *Cimino*, the *Larned* plaintiffs asserted that the transfer of JWC's property to respondents was a fraudulent conveyance of assets that should have been available to satisfy the claims

of the Asbestos Victims. The *Larned* plaintiffs sought legal relief in the form of a judgment declaring that the corporate veil between Celotex and JWC was pierced, making JWC liable for money judgments against Celotex; an order recovering the JWC assets transferred to respondents as part of the LBO; and compensatory damages for the value of assets transferred to respondents which had been retransferred to third parties. They also sought various forms of equitable relief including an injunction, an accounting and the appointment of a receiver. The *Larned* plaintiffs demanded a jury trial.

In December 1989, respondents filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The bankruptcy filing had the effect of staying all litigation against respondents Walter Industries and affiliates, including all individual asbestos-related tort suits and the *Cimino* and *Larned* class actions. Several days later, respondents filed this adversary proceeding against, among others, the more than 2,000 individual plaintiffs, including petitioners, who had brought tort actions seeking money damages against respondents for asbestos-related injuries.

Respondents seek a judgment declaring that they are not liable for money damages caused by the asbestos activities of Celotex. As a threshold bar to their own liability as successors to JWC or as transferees of its assets, respondents seek a declaration that "the corporate veil between JWC and Celotex may not be pierced in order to make JWC liable for the asbestos-related liabilities of Celotex."[2] In

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[2] Respondents' complaint also prays for declarations that the 1988 LBO "was not a fraudulent conveyance," that none of

substance, then, respondents demand judgment in favor of JWC on money damage claims asserted against it in over 2,000 personal injury tort suits, the *Cimino* class action, and the *Larned* case. Petitioners answered, denying the allegations of the complaint and made a timely demand for a jury trial.[3]

On September 8, 1992, the bankruptcy court bifurcated this case for trial. The veil-piercing issue will be tried first in December 1993. Other issues, including principally whether the 1988 LBO was a fraud on JWC's creditors, will not be tried until the veil-piercing trial determines whether JWC must respond in damages for the asbestos injuries of Celotex's tort victims. If petitioners prevail on that issue, the fraudulent conveyance claim will be tried thereafter.

Petitioners moved the district court to withdraw the reference of the adversary proceeding to the bankruptcy court on the grounds that they are entitled to a jury trial and that the bankruptcy court lacks the power to conduct a jury trial. On September 15, 1992, the district court denied the motion. (App. 32a). It held that petitioners have no constitutional right to a jury trial on the veil-piercing issue, concluding that such actions were historically brought

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respondents "is the successor in interest to the asbestos-related liabilities of either [JWC] or Celotex," and that respondents are not, in any event, "liable for the asbestos-related liabilities of either JWC or Celotex." None of these additional claims is implicated in this petition.

[3] Petitioners also unsuccessfully moved the bankruptcy court and the district court to abstain from exercising jurisdiction over the adversary proceeding and exhausted their appellate remedies on that question.

in equity and that the relief sought is an equitable "determination to ignore a legal fiction." (App. 34a). Following the district court's decision, the bankruptcy court struck petitioners' jury demand on the veil-piercing issue. (App. 36a).[4]

On February 23, 1993, the district court denied petitioners' motion to certify for interlocutory appeal its September 15, 1992, order denying the motion to withdraw the reference. (App. 38a) Petitioners therefore sought a writ of mandamus from the United States Court of Appeals for the Eleventh Circuit commanding the district court to withdraw the reference of this adversary proceeding to the bankruptcy court and to conduct a jury trial in the district court. On April 19, 1993, the Eleventh Circuit denied the writ in a one-sentence order giving no explanation of the grounds for its ruling. (App. 40a)

REASONS FOR GRANTING THE PETITION

The petition should be granted because, in violation of the Seventh Amendment, the court of appeals has permitted the bankruptcy court to try an action that will determine petitioners' entitlement to money damages without a jury in the face of a timely demand for a jury trial. This Court has long recognized that it is the "responsibility of the Federal Courts of

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[4] The district court also ruled that there is no right to a jury trial on the fraudulent conveyance claim, purporting to distinguish this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43-46 (1989). The bankruptcy court, however, proceeded to strike the jury demand only as to veil piercing and not as to the fraudulent conveyance issue, which will be tried separately. Accordingly, the lower courts' disposition of petitioners' Seventh Amendment right as to the fraudulent conveyance issue is not presented in this petition for certiorari.

Appeals to grant mandamus" when the lower courts fail to respect a party's constitutional right to trial by jury. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962). In light of this clear command, the court of appeals' one-line order denying mandamus was presumably based on its conclusion that petitioners have no Seventh Amendment right to a jury trial on the veil-piercing issue. If so, the decision below is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131 (2d Cir. 1991), which recognized a constitutional right to a jury trial in an action seeking to pierce the corporate veil. The Eleventh Circuit's decision is also manifestly incorrect under this Court's jury trial analysis as set forth in such decisions as *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990) and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33. This Court should grant certiorari to resolve the apparent conflict between the Second and Eleventh Circuits on the availability of a jury trial in damage actions that present the issue of piercing the corporate veil.

It is possible that the Eleventh Circuit denied mandamus on one of the alternative (and equally erroneous) grounds urged by respondents below. Relying on the Seventh Circuit's decision in *First National Bank of Waukesha v. Warren*, 796 F.2d 999 (7th Cir. 1986), respondents argued 1) that mandamus is an inappropriate means of reviewing denial of a jury trial; and 2) that mandamus should be denied because petitioners failed to show a "clear and indisputable" right to a jury trial. If the Eleventh Circuit based its decision on either of these grounds, it placed itself

in conflict with many other circuits. At least eight circuits have recognized that mandamus is the appropriate means to review denial of the right to jury trial, as this Court expressly held in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), *Dairy Queen, supra*, and *Ex Parte Simons*, 247 U.S. 231 (1918). Similarly, when the issue presented on mandamus is the Seventh Amendment right to jury trial, at least three circuits have read *Beacon Theatres* and *Dairy Queen* as rejecting the "clear and indisputable" right standard applicable in other mandamus cases. In short, if the Eleventh Circuit denied mandamus on either procedural basis asserted by respondents in opposing the petition below, its decision squarely conflicts with decisions of other circuits and of this Court, itself. The conflicts presented touch on vital issues in the administration of justice and can only be resolved by certiorari.

1.a. If the Eleventh Circuit's denial of mandamus rested on a determination that petitioners have no constitutional right to a jury trial, its decision cannot be reconciled with the Second Circuit's decision in *Wm. Passalacqua*. In that case, the Second Circuit held that the Seventh Amendment guarantees the right to a jury trial in an action seeking to hold shareholders liable for a money judgment against a corporation. 933 F.2d at 136-37. The plaintiffs had obtained a judgment for breach of contract against the corporation. Unable to satisfy their claim from the assets of the corporation, the plaintiffs sued the shareholders and other corporations under common control for the uncollected balance of the judgment debt. The district court submitted the issue whether the shareholders were liable for the judgment against

the corporation to a jury over the defendants' objection. *Id.* at 134. On appeal, the Second Circuit applied the analytical framework laid down by this Court in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. at 42. The court of appeals first concluded that the theory of shareholder liability in such an action, variously referred to as "piercing the corporate veil," "alter ego" or "corporate disregard," has both legal and equitable roots in 18th-century English practice. 933 F.2d at 136. The court next looked to the remedy sought—collection of a money judgment—and found it to be of a kind "typically achieved in an action at law." *Id.* Because the historical roots of the claim were not exclusively equitable, and because the remedy sought was legal, the Second Circuit concluded that the Seventh Amendment guaranteed the right to a jury trial. *Id.*[5]

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[5] Without discussing the point explicitly, many other courts have submitted veil-piercing disputes to juries, evidently on the assumption that the Seventh Amendment so requires. *E.g.*, *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1133 (5th Cir. 1988); *American Protein Corp. v. A.B. Volvo*, 844 F.2d 56, 59 (2d Cir.), *cert. denied*, 488 U.S. 852 (1988); *Mackey v. Burke*, 751 F.2d 322, 326-27 (10th Cir. 1984); *Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir. 1984); *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 421 & n.5 (5th Cir. 1980); *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1379 (10th Cir. 1980); *Delchamps, Inc. v. Borkin*, 429 F.2d 417, 419 (5th Cir. 1970); *Continental Casualty Co. v. United States*, 308 F.2d 846, 848 (5th Cir. 1962); *Cantiere DiPortovenere Piesse S.p.A. v. Kerwin*, 739 F. Supp. 231, 236 (E.D. Pa. 1990). *See also* L. Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* 84 (1927). There is no denying that courts now unhesitatingly hold jury trials to find the facts where money damages are sought from a shareholder under the doctrine of piercing the corporate veil.

There is no relevant distinction between the dispute in which the Second Circuit found a constitutional right to a jury trial in *Wm. Passalacqua* and that in which petitioners demanded, but were denied, that right in the case at bar. In both cases, the liability to be determined was that of shareholders for money damages resulting from the conduct of the corporation. It makes no difference, of course, that this issue is presented here in a declaratory judgment suit, while in *Wm. Passalacqua* the litigation proceeded as a conventional suit for damages. This Court has long recognized that to determine the right to jury trial in a suit for declaratory relief, one must "look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988). Here, respondents seek a judgment that JWC is not liable for money damages caused by Celotex's asbestos activities. In the absence of the declaratory judgment remedy, JWC's liability would be resolved in the existing tort suits seeking money damages from JWC on a veil-piercing theory—precisely the same theory on which the plaintiffs sued the shareholders in *Wm. Passalacqua*. Thus, if the decision below rests on a determination that petitioners have no right to a jury trial, it squarely conflicts with the Second Circuit's decision in *Wm. Passalacqua*.[6]

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[6] Respondents argued to the court of appeals that *Wm. Passalacqua* is distinguishable from this case because the plaintiff there already had a judgment for a sum certain against the corporation which it sought to collect from the shareholders, while petitioners do not yet hold judgments against Celotex. This is a distinction without a difference. Whether an action seeking

b. On the other hand, if the Eleventh Circuit's denial of mandamus rests on a determination that mandamus is not generally available to review the improper denial of a jury trial, or that mandamus may issue to compel a jury trial only on a showing of "clear and indisputable" right, its decision conflicts with longstanding precedents of this Court and with numerous appellate decisions. In an unbroken line of authority commencing with Justice Holmes' opinion in *Ex Parte Simons*, 247 U.S. 231 (1918), the Court has recognized that mandamus is the appropriate means for reviewing denial of a jury trial. As the Court emphasized in *Beacon Theatres*, "[w]hatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." 359 U.S. at 511. In *Dairy Queen*, the Court noted that *Beacon Theatres* "emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." 369 U.S. at 472. In both cases, the Court reversed an appellate court's denial of mandamus where the writ was sought to preserve the right to jury trial.[7]

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to pierce the corporate veil and hold shareholders liable is brought with the underlying legal claim against the corporation, as in petitioners' personal injury actions against Celotex and JWC, or only after a judgment has been obtained against the corporation, the remedy sought is the same—money damages—and the entitlement to a jury trial is likewise identical.

[7] Those decisions remain good law. The Court recently cited *Beacon Theatres* with approval for the proposition that "[t]his Court has made clear, for example, that a stay order that deprives a party of the right to trial by jury is reversible by mandamus." *Gulfstream Aerospace Corp.*, 485 U.S. at 288 n.13.

Eight federal courts of appeals have heeded the Court's directive to grant mandamus freely to protect the jury trial right under the Seventh Amendment. *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 969 (9th Cir. 1983); *In re Vorpahl*, 695 F.2d 318, 319 (8th Cir. 1982); *Maldonado v. Flynn*, 671 F.2d 729, 732 (2d Cir. 1982); *In re Zweibon*, 565 F.2d 742, 745-46 (D.C. Cir. 1977); *In re Union Nacional de Trabajadores*, 502 F.2d 113, 115-16 (1st Cir. 1974), *opinion withdrawn on other grounds*, 527 F.2d 602 (1st Cir. 1975); *Eldredge v. Gourley*, 505 F.2d 769, 770 (3d Cir. 1974); *General Tire & Rubber Co. v. Watkins*, 331 F.2d 192, 194 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964); *Black v. Boyd*, 248 F.2d 156, 159-61 (6th Cir. 1957). Respondents urged the Eleventh Circuit to follow the Seventh Circuit's lone and aberrant decision in *First National Bank of Waukesha v. Warren*, 796 F.2d 999 (7th Cir. 1986)[8], and to deny mandamus on the ground that entitlement to a jury trial can be adequately protected by a post-trial appeal. The Eleventh Circuit's failure to explain its denial of mandamus leaves open the possibility that it accepted respondents' invitation to follow *Warren* and thereby sidestepped the Court's decisions in *Beacon Theatres* and *Dairy Queen*. If so, certiorari should be granted to resolve the conflict among the circuits and to protect the Court's Seventh Amendment precedents. *See Kamen v. Nordberg*, 108 S. Ct. 1119, 1120 (1988) (White, J., dissenting from denial of certiorari).

If the Eleventh Circuit accepted respondents' alternative contention that mandamus should be denied

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[8] The continuing vitality of *Warren* is subject to question even in the Seventh Circuit. *See Maloney v. Plunkett*, 854 F.2d 152, 154 (7th Cir. 1988).

because petitioners did not show a "clear and indisputable" right to a jury trial, its decision would likewise present a conflict necessitating this Court's review. The D.C., First and Ninth Circuits have held that under *Beacon Theatres* mandamus lies to protect the right to jury trial whether or not the right is "clear and indisputable." *Wilmington Trust v. United States District Court*, 934 F.2d 1026, 1028 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1578 (1992); *In re Union Nacional de Trabajadores*, 502 F.2d at 115-16; *Filmon Process Corp. v. Sirica*, 379 F.2d 449, 450-51 (D.C. Cir. 1967). By contrast, the Seventh and Eighth Circuits have held that the "clear and indisputable" standard does apply in the jury trial context. *See Warren*, 796 F.2d at 1006; *In re Don Hamilton Oil Co.*, 783 F.2d 151, 151 (8th Cir. 1986). If this was the basis for the Eleventh Circuit's decision, certiorari should be granted to resolve the conflict between the circuits.[9]

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[9] The Eleventh Circuit's decision cannot, of course, escape review by this Court simply because the court of appeals chose not to explain the basis for its ruling. *See Taylor v. McKeithen*, 407 U.S. 191, 195 (1972) (Rehnquist, Burger and Powell, JJ., dissenting) ("[w]hile an opinion from the Court of Appeals fully explaining the reason for its reversal of the District Court would undoubtedly be of assistance to our exercise of certiorari jurisdiction here, it is by no means essential"). If a lower court could escape review by ruling without opinion, Supreme Court precedent would be binding only in theory, and settled rights would be eroded in silence. Since any of the possible grounds for its decision would put the Eleventh Circuit in conflict with other circuits or with this Court itself on important issues, this case merits certiorari and is ripe for review. Alternatively, the Court should summarily grant certiorari, vacate the judgment below and remand the case with directions for the Eleventh Circuit to state the grounds for its decision. *See Taylor v. McKeithen*,

2. Whatever the basis for the denial of mandamus, the decision below is clearly wrong on the merits. If the Eleventh Circuit concluded that petitioners have no right to a jury trial, this Court's Seventh Amendment precedents show the error of that ruling. And if the Eleventh Circuit concluded that mandamus should not issue notwithstanding the denial of petitioners' jury trial rights, it is in error because the Court's decisions in *Beacon Theatres* and *Dairy Queen* are directly to the contrary and remain governing law.

a. In determining the scope of the Seventh Amendment, the Court has applied a two-part analysis. First, the Court "compare[s] the statutory action to 18th-century actions brought in the courts of England prior to the merger of law and equity. Second, [the Court] examine[s] the remedy sought and determine[s] whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42. As the Court has repeatedly emphasized, the second is the more important factor. *Id.*; *Chauffeurs, Teamsters & Helpers*, 494 U.S. at 565; *Curtis v. Loether*, 415 U.S. 189, 196 (1974).

Here, both factors make clear that veil piercing is, as the Second Circuit concluded in *Wm. Passalacqua*, a legal issue with an attendant right to a jury trial. While veil piercing did not exist in 18th-century England, there were analogous legal actions in the law courts that form part of the theoretical basis for the modern doctrine, and the historical analysis therefore supports the right to a jury trial under the Seventh Amendment. More important, this case will decide

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407 U.S. at 194 (vacating appellate decision rendered without opinion and remanding for further proceedings).

whether petitioners can recover money damages, the classic legal remedy, in their pending tort actions against JWC. Because this case resembles and descends from historically legal actions and involves a legal remedy, petitioners' right to a jury trial necessarily follows.

The modern doctrine of piercing the corporate veil has no direct ancestor—in the law courts or in equity—in English law as it existed before 1791.[10] But the Seventh Amendment guarantees the right to a jury trial even in "actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law,

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[10] As one commentator put it, in 18th-Century England "the occasion had not arisen for the Carrollian expedient of 'piercing the corporate veil.' " A. Dubois, *The English Business Company after the Bubble Act 1720-1800* 120 (1971). This is hardly surprising given that there were only a handful of business corporations chartered in England until a later era. "Throughout the whole of the eighteenth century England chartered some half-dozen corporations for manufacturing purposes, and hardly more in any other business sphere." Handlin & Handlin, *Origins of the American Business Corporation*, 5 Journal of Economic History 1, 3 (1945) (hereinafter "Handlin & Handlin"). Instead, business was commonly carried out through joint stock companies, a hybrid form of entity that evolved from partnerships. *Id.* The limited liability of shareholders in a corporation was not definitively resolved in England until Parliament addressed the matter by legislation in the 1850's. *See* P. Blumberg, *The Law of Corporate Groups: Tort, Contract and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (hereinafter "Blumberg") § 1.03.3 at 19 (1987). Moreover, since corporations could, in 17th and 18th-century England, assess their shareholders to pay corporate debts, the issue of shareholder liability for corporate debts could only arise if the corporation refused to make such assessments. Handlin & Handlin at 12-13.

rather than in an action in equity or admiralty." *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974); *see Parsons v. Bedford*, 28 U.S. [3 Pet.] 433, 447 (1830). In such a case, the Court looks for "an analogous cause of action that existed in the 18th century to determine whether the nature of [the suit] is legal or equitable." *Chauffeurs, Teamsters & Helpers*, 494 U.S. at 566.

Modern veil piercing imposes vicarious liability on a corporation's parent company or individual shareholders for the acts of the corporation and typically requires a showing of domination and control over the corporation by the parent or shareholders. Blumberg § 6.01 at 106-07, § 6.02 at 114-15, § 6.05 at 123-24 (1987); *see Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984). In 18th-century England, the principal forms of vicarious liability were that of a principal for the acts of his agent and the liability of a master for his servant's torts (often referred to as *respondeat superior*), both of which were enforced in the law courts. J.H. Baker, *An Introduction to English Legal History* 464-65 (3d ed. 1990); *see* 8 W. Holdsworth, *A History of English Law* 474-79 (1926); Holmes, *Agency*, 4 Harv. L. Rev. 345 (1891). Both species of vicarious liability rest on the control of the principal or master over the agent or servant, much as modern veil piercing depends on a showing of domination and control of the subsidiary by the parent. *See ibid.* The close similarity between vicarious liability under the law of agency and *respondeat superior* and the derivative liability of a parent corporation for the torts of its subsidiary points up the legal roots of modern veil-piercing doctrine. The appropriateness of this analogy is underscored by the fact that courts

often draw on common law notions of *respondeat superior* and agency in articulating the elements of modern veil piercing. Blumberg § 6.06 at 125-128; *see Davis v. Alexander*, 269 U.S. 114, 117 (1925) ("[w]here one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company"); *H.J., Inc. v. International Telephone & Telegraph Corp.*, 867 F.2d 1531, 1549 (8th Cir. 1989) (agency); L. Gower, *Gower's Principles of Modern Company Law* 123-24 (4th ed. 1979) (agency is one theory courts in England have used to lift the corporate veil).[11] In short, veil piercing has a firm basis in traditional common law claims. The first branch of this Court's analysis therefore supports a finding that petitioners have a right to a jury trial.[12]

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[11] Other theories underlying modern veil piercing include the theories that a corporation is a mere "instrumentality" or "alter ego" of another corporation or has no separate corporate identity. Blumberg § 6.01 at 111. While these theories have no clear 18th-century ancestors, they closely resemble *respondeat superior* and agency in requiring a showing of domination and control of the wrongdoer by the party on whom liability is sought to be imposed. *Id.* at 106-07, 111. The similarity of these newer theories to the historically legal theories underlying veil piercing further reinforces the conclusion that veil piercing is legal, rather than equitable, in its historical derivation.

[12] In attempting to trace veil piercing to exclusively equitable roots, respondents pointed below to only one English decision of the 18th-century, *Dr. Salmon v. The Hamborough Company*, 1 Chancery Cases 204 (1671). That was a suit in equity in which the House of Lords ordered a corporation to make an assessment on the shareholders sufficient to pay the corporation's debt to the plaintiff. *Id.* at 207. The decision was grounded on the corporation's power to assess its shareholders and resulted in the

b. The legal nature of the remedy at issue here would make petitioners' right to a jury trial clear even if the history were less conclusive than it is. *See Chauffeurs, Teamsters & Helpers*, 494 U.S. at 570-73. The essence of the dispute between petitioners and respondents is whether JWC is or is not liable to the Asbestos Victims for money damages caused by Celotex's asbestos activities. Money damages is,

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widespread omission of that power in later corporate charters precisely to avoid the result in *Dr. Salmon*. Blumberg § 1.03.1 at 13 ("[a]s a result, indirect liability in England gradually disappeared"); L. Gower, *Gower's Principles of Modern Company Law* 26; 8 W. Holdsworth, *A History of English Law* 204-05. It remains true that a plaintiff with an unsatisfied judgment against the corporation may sometimes compel the corporation to enforce obligations of the shareholders to the corporation (such as unpaid stock subscriptions), much as the Court in *Dr. Salmon* compelled the corporation to make assessments. *See Hawkins v. Glenn*, 131 U.S. 319, 332-34 (1889); *Hatch v. Dana*, 101 U.S. 205, 214-15 (1879); *Providence State Bank v. Bohannon*, 426 F. Supp. 886, 890 (E.D. Mo. 1977), *aff'd*, 572 F.2d 617 (8th Cir. 1978). That principle, however, has nothing to do with modern veil-piercing which subjects shareholders and parent companies to liability without regard to whether they have unfulfilled obligations to their corporations or subsidiaries. Respondents also relied below on a 19th-century line of American cases espousing the "trust fund" doctrine under Justice Story's decision in *Wood v. Dummer*, 3 Mason's Rep. 308, Fed. Cas. No. 17,944 (1824). *See Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371, 382-83 (1893); *United States v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987). This doctrine "has never been recognized in England, nor does it exist under the common law . . . ." 15A W. Fletcher, T. Bjur & J. Reinholtz, *Fletcher's Cyclopedia of the Law of Private Corporations* § 7371 at 55 (1990); *see Sterrett v. White Pine Sash Co.*, 176 Wash. 663, 30 P.2d 665, 666 (1934). Since the trust fund doctrine did not exist in English practice in 1791 when the Constitution was adopted, it is irrelevant to the Seventh Amendment historical analysis.

of course, a quintessentially legal remedy. *Curtis v. Loether*, 415 U.S. at 196 (money damages is "the traditional form of relief offered in the courts of law"). Because their ability to obtain legal relief will be decided in this case, petitioners are entitled to a jury trial.

The declaratory nature of the action commenced by respondents below in no way alters this conclusion. Because declaratory relief is a modern innovation, rather than a creature of the common law or traditional equity practice, the right to a jury trial in such an action is tested by looking to the claims that would have been brought if declaratory relief were not available. *Gulfstream Aerospace Corp.*, 485 U.S. at 284. A party that has been or is about to be sued on legal claims cannot cut off his opponent's right to a jury trial by filing a preemptive suit for a declaratory judgment that it has no liability on those legal claims. *Beacon Theatres*, 359 U.S. at 504. That, however, is precisely what the decision below permits the debtors to do here.

If declaratory relief were not available, the issue whether JWC's corporate veil can be pierced to make it liable for money damages caused by Celotex's torts would be resolved in the pending individual tort suits seeking money damages from JWC and in the *Cimino* class action. The plaintiffs in those cases, including petitioners, have demanded jury trials, and there can be no serious dispute that they have a constitutional right to jury trials in that posture. Now, however, respondents claim, and the Eleventh Circuit has apparently held, that petitioners' right to a jury trial in those cases has been eliminated by respondents' simple expedient of suing for a declaratory judgment

to preclude money damages on the ground that the veil between Celotex and JWC cannot be pierced. In permitting this circumvention of the Seventh Amendment, the decision below flouts the Court's holding in *Beacon Theatres* and cannot stand.[13]

c. If the Eleventh Circuit's disposition reflects a view that mandamus is not ordinarily appropriate to review the denial of a jury trial, or that petitioners failed to show a clear and indisputable right to a jury trial, its decision is plainly wrong. These limitations on relief were imposed by the Court in ordinary man-

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[13] Respondents argued below that the personal injury lawsuits and the *Cimino* class action seeking money damages from JWC on a piercing theory should be ignored in evaluating the relief at issue in this action and that the court of appeals should focus instead on the relief sought in the *Larned* class action. However, the undisputed right of these personal injury plaintiffs to a jury trial on their claims for money damages against JWC cannot be eliminated merely because other claims asserted against JWC are allegedly equitable. In any event, the relief at issue from *Larned* is plainly legal. The relief sought in *Larned* on the veil-piercing issue is a judgment declaring that the corporate veil between JWC and Celotex is pierced and declaring "JWC to be liable for all asbestos claims against Celotex," the precise opposite of the relief sought by respondents here. In the absence of declaratory relief, the piercing issue raised in *Larned* would plainly be resolved in the hundreds of personal injury lawsuits seeking to hold JWC liable for money damages caused by Celotex's asbestos activities. Like this adversary proceeding, therefore, the piercing claim in *Larned* involves legal relief. While *Larned* also seeks equitable relief in the form of an injunction, an accounting, and a receivership, none of that relief is at stake in the trial on the veil-piercing issue set for December 1993. Even if that trial implicated equitable along with legal remedies, petitioners would enjoy a Seventh Amendment right to jury trial of the legal issues under the well-settled doctrine of *Beacon Theatres*, 359 U.S. at 510-11, and *Dairy Queen*, 369 U.S. at 479-80.

damus cases to "insure that the writ will issue only in extraordinary circumstances . . . ." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). The Court has made clear, however, that these requirements have no application when mandamus is sought to vindicate the right to a jury trial. Any contrary holding by the Eleventh Circuit is inconsistent with the Court's long-standing precedent.

The Court squarely held in *Dairy Queen*, *supra*, and *Beacon Theatres*, *supra*, that the courts of appeals have the responsibility to use mandamus to correct improper denials of a jury trial. *See* page 12, *supra*. The rationale for using mandamus rather than appeal to protect the right to a jury trial was explained in the Court's first decision in the area, *Ex Parte Simons*, 247 U.S. at 239:

> If we are right, the order was wrong and denied the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Court to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.

The *Simons* rationale retains its full vitality today.

The Seventh Circuit is the only circuit to hold that mandamus is available to review jury trial denials only when the denial can not be effectively reviewed on appeal.[14] The Seventh Circuit concluded in *Warren*,

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[14] In the Seventh Circuit's view, this would normally occur only when a trial court proposes to try equitable claims in advance of overlapping legal claims, presenting the danger that

supra, that, to the extent *Dairy Queen* and *Beacon Theatres* held otherwise, they had been "undermined" by later decisions from the Court emphasizing the extraordinary nature of the writ of mandamus and the need to confine it to those cases which can not be reviewed by appeal. 796 F.2d at 1006. However, none of the cases that the Seventh Circuit cited were jury trial cases. *Id.* at 1004-06. Those cases are simply examples of the principles applicable in mandamus cases outside the jury trial context and say nothing about the continuing vitality of *Dairy Queen* and *Beacon Theatres*. *Id.* at 1008 (Ripple, J., dissenting).

Dairy Queen and *Beacon Theatres* also make clear that, where the right asserted is the right to a jury trial, there is no requirement that the petitioner show a "clear and indisputable" right in order for mandamus to issue. This limitation on the availability of mandamus relief was likewise imposed to limit the writ to "extraordinary circumstances." *Allied Chemical*, 449 U.S. at 35. Under *Dairy Queen* and *Beacon Theatres*, however, mandamus is not confined to "extraordinary circumstances" in jury trial cases but is the normal method of review. The Court's emphasis in *Dairy Queen* on the "responsibility" of the courts

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the decision on the equitable claims would have preclusive effect on the legal claims and thus effectively deprive a party of its right to a jury trial on the legal claims. 796 F.2d at 1003-04. While this fact scenario was present in *Beacon Theatres*, nothing in that decision suggests that its holding was limited to cases where prior determination of equitable claims may have preclusive effect on legal claims. This Court's later decision in *Dairy Queen*, which did not involve a risk of separate trials of legal and equitable claims, made clear that the use of mandamus to review denials of the right to trial by jury is not limited to the fact setting of *Beacon Theatres*. 369 U.S. at 472.

of appeals to issue mandamus to correct improper denials of a jury trial would ring hollow indeed if the writ were confined to cases where the right is shown to be "clear and indisputable." As the D.C., First and Ninth Circuits have recognized, the plain import of the Court's decisions in *Dairy Queen* and *Beacon Theatres* is that mandamus should issue to correct improper denials of the right to a jury trial whether the question is a close one or not. *Wilmington Trust*, 934 F.2d at 1028; *In re Union Nacional de Trabajadores*, 502 F.2d at 115-16; *Filmon Process Corp. v. Sirica*, 379 F.2d at 450-51; *see* 16 C. Wright, A. Miller, E. Cooper & E. Grossman, *Federal Practice & Procedure* § 3935 at 243-44 (1977) ("review and correction by mandamus [is required], no matter how difficult or uncertain the law surrounding the jury trial question may be"). Thus, if the Eleventh Circuit denied mandamus on the ground that petitioners failed to make a "clear and indisputable" showing of their right to a jury trial, its decision is wrong and should be reviewed by this Court on certiorari.[15]

3. The appropriateness of certiorari in this case is reinforced by the substantial importance of this litigation in its own right and the broad implications of the issues presented for other litigants. More than 100,000 persons have unsatisfied claims for personal injuries caused by exposure to Celotex asbestos products. The total amount of those claims, calculated at historical settlement values, exceeds $1 billion without considering the claims of those thousands of workers exposed to Celotex asbestos products over the years

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[15] Denial of mandamus on this ground would also be erroneous because, as we showed above, pages 15-18, *supra*, petitioners' right to a jury trial is indeed clear and indisputable.

whose diseases have not yet manifested but will do so. Only the smallest fraction of the claims can be satisfied from the assets of Celotex alone. The only hope of recovering more than that small fraction lies in the claims that respondents seek to preclude in this case. Under the decisions of the courts below, those claims will be resolved without a jury. The lower courts' decision to deny a jury trial to thousands of litigants seeking to recover billions of dollars of personal injury damages should be reviewed by this Court.

The issues presented here are recurring ones that will affect many litigants other than petitioners. Claims based on piercing the corporate veil are brought in the federal courts with increasing frequency, and it is of obvious importance that the right to a jury trial in such actions be settled rather than depend on the geographical happenstance of where a case is brought. Without a decision from this Court, the lower courts will fall into increasing disarray on the important constitutional issue whether the Seventh Amendment extends to claims which seek to pierce the corporate veil.[16]

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[16] There are already conflicting district court decisions from circuits other than the Second and Eleventh. *Compare Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc.*, 775 F. Supp. 893, 895 n.1 (E.D. Va. 1991), *rev'd on other grounds*, 974 F.2d 545 (4th Cir. 1992) (following *Wm. Passalacqua*); *Bower v. Bunker Hill Co.*, 675 F. Supp. 1254, 1261-62 (E.D. Wash. 1986) (finding a right to a jury trial on a claim that subsidiary corporation was alter ego of parent) *with United States v. Golden Acres, Inc.*, 684 F. Supp. 96, 103 (D. Del. 1988) (no right to a jury trial on claim for piercing corporate veil); *In re Lee Way Holding Co.*, 118 B.R. 544, 547-48 (Bankr. S.D. Ohio 1990) (same).

The issues raised by the Seventh Circuit's decision in *Warren*, and by the decision below to the extent it follows *Warren*, likewise have far-reaching significance for future litigants. The complexities of modern litigation, and the proliferation of new causes of action not easily labelled as legal or equitable, engender substantial uncertainty concerning the right to a jury trial. There are thus frequent legal challenges to a district judge's denial of the right to a jury trial. As matters now stand, however, the proper means to review such denials, by petition for mandamus or direct appeal, and the standard for granting mandamus, vary with the circuit in which a lawsuit happens to be filed. The method of review of decisions concerning the constitutional right to a jury trial should be uniform. The Court should grant certiorari to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 16, 1993

APPENDIX

APPENDIX A

ASBESTOS VICTIMS REPRESENTED BY CAPLIN & DRYSDALE AND RYDBERG, GOLDSTEIN & BOLVES IN MAKING THIS PETITION FOR A WRIT OF CERTIORARI

In the underlying bankruptcy adversary proceeding from which this petition arises, the respondents, Walter Industries, Inc. and its subsidiaries, have sued for declaratory relief. They have named as defendants The Celotex Corporation and Jim Walter Corporation, as well as several thousand asbestos personal injury plaintiffs with claims against those two companies and the respondents.

Caplin & Drysdale, Chartered, and Rydberg, Goldstein & Bolves, P.A., have entered appearances on behalf of many but not all of the asbestos victims named as defendants in the adversary proceeding, and have litigated the proceeding on behalf of all asbestos victims with claims against the respondents' assets. A few other firms have entered appearances on behalf of some of the other named individual defendants; except for filing answers in their clients' behalf, none has actively participated in this proceeding. It is unclear whether the respondents ever served the remaining individual defendants. The respondents, in any event, agreed with the bankruptcy judge that they would not seek default judgments against any of the asbestos victims who may have been served with process, but who failed to appear and answer their complaint.

Caplin & Drysdale, Chartered, and Rydberg, Goldstein & Bolves, P.A., represent the following asbestos victims as defendants in the adversary proceeding, all of whom are petitioners before the Court:

Anita Rex Hillberg

J.W. Baker
Mable Baker
J.C. Banks
James Bratton
Peggy Jo Bratton
Jack Byrd
Rosalie Byrd
Falah Carter
Louis Carter
George Cato
Margaret Harrison
Robert Harrison
Mary Lois Holley
Samuel Holley
Mary Lou Martin
Paul Martin
Juanita Mullens
Tony Oliver Mullens
Alfred Pintor, Jr.
Carolyn A. Pintor
Bonnie Rhodes, Adm. for William Rhodes, deceased
Bonnie Rhodes
Bobby Jean Robinson
Louise Robinson
Harry Selman
Margaret R. Selman
Sammie Shamblin
Monnie I. Shamblin
John Hamilton Thomson
Virginia Thomson

William Chisholm

Alvin T. Adams, Sr.
Ettie Jane Adkins

Jessie Allen
Johnnie Arline
Oran Arline
Catherine Armstrong
Leimuel T. Armstrong, Jr.
Billie Jo Bagett
Eloise Baggett
Eloise Baggett, Adm. for
Rufus Tyler, deceased
Thomas Baggett
Herbert R. Bailey
Margaret Bailey
Rufus A. Ballard, Sr.
Thelma Ballard
Lola Barrington
Ralph Barrington
James Betz
Donald C. Black
Jimmie Ruth Bonds
Maulden Bonds
Joyce Borne, Adm. for
Otis Borne, deceased
Thomas Borque
Virginia Borque
Harlan F. Bradberry
Junior Brady
Myrtle Broussard, Adm. for
Frank Broussard, deceased
Geneva Brown
Jerry L. Brown
Warren J. Brown
Getrude Buchman
John Buchman
Annie Bucklew
Woodrow Bucklew
Jeaneane Burdine
Raymond Burdine
David L. Carrington

Elizabeth Chambers
Jo Ann Cherry
Robert Cherry
Roy Chesson
Gene Church
James T. Clark
Q.B. Clark
Don G. Clifton
Ruby Clifton
Billie Russell Coleman
Wilbur H. Cornes
Albert D. Cowart
Joanne Cowart
George Crawford
Lola B. Crawford
Robert C. Culbert
Betty R. Davis
Beola Delafosse
Jesse Delafosse
Ray Easley
Rudolph Falgout, Sr.
John H. Faulk
Wylma Faulk
Beatrice Fezia
Jesse Fezia
Barney Ford
Rebecca Ford
Alma Fortenberry
Bertha Forward
Emerson Forward
James E. Foster
Lee Gabel
Garfiled Gage, Sr.
Melanie Gage
Alfred C. Gentry
Pauline Gentry
Arthur Gilchriest
Betty Gilchriest

Mary Granger
Evie Graves, Adm. for
Fred Graves, deceased
William A. Hale
Eva Hanks
George Hanks
Annie Mae Hardy
Mason Alexander Hardy
Lily Hart
Robert B. Hart
Charles M. Harvard
May Harvill
William Barclay Harvill
Frances Henslee
Lee Henslee
John Henry Henson
Minnie Henson
French Hicks
Nancy Hicks
Glenn B. Hilton
Leta Hilton
Catherine Hollis
John J. Hollis, Sr.
Syble Hutson, Adm. for
Ersel Hutson, deceased
Myrtle Issacs
Walter Issacs
Alex Ivins, Adm.
for Alvie Ivins
Andrew J. Jacobs, Sr.
Melvia Jacobs
Coolie R. Johnson
Pearl E. Johnson
Joe Ed Jones
Karen Jones
John C. Kelly, Jr.
Winefred Kelly

Donnie Gene Killough
William Knowles
Joseph Harry Lalonde
Mary Lalonde
Marianne Lytle
Robert W. Lytle
Nell Lytton
William P. Lytton
Mary E. Mabry, Adm. for
George Mabry, deceased
Gay Marino
Salvador Marino
Gloria Merendino
Morris Merendino, Jr.
Edwin Morgan
Mary Morgan
Jessie Morreale
Peter Morreale
Doyle Lee Morris
Earl M. Morris
Donald Moss
Melvia Moss
Bonnie Mott
Clovis Mott
Barbara Neugent
Mack A. Neugent
R.C. Norwood
Leon M. Page
Marie Page
Andrew J. Patrick
Helen Patrick
Betty Pelt
Charlie A. Pelt
Joe A. Peralez
Carol Pilgreen
Jewel Pilgreen
Juanita Poole, Adm.
for Marvin Poole, deceased

Bryant D. Mullins
Lee Nelson
Mary Nelson
Wiliam H. Posey
Hazel Prescott
Spencer Prescott
Pauline Ramirez
Grover C. Ransom
Kenneth R. Reppond
Tamae Reppond
Carroll C. Resweber
Rena M. Richard
Esker Roach
J.T. Ross
Lena Sanford
Simon Bland Sanford
James M. Sellers, Sr.
Velma Sellers
Gene M. Sexton
Jenny Sexton
Cora Simmons
William Simmons, Sr.
Morris Simon
Aline Sims
Clifford Sims
Abbie L. Singletary
Frankie Smith
Warren Smith
Lois Snodgrass, Adm. for
Thomas Snodgrass, deceased
Louis Snodgrass
John T. Snowden
Kenneth Spencer
Ruby Spencer
Lawrence C. Spurlock
Linda Spurlock
Floyd J. Stevens
Percy L. Stewart

Charlene Stough
Marcus D. Stough
Charley Sweat
Oveda Sweat
Alvin E. Taylor
Juanita Taylor
Larry Joe Terrell
Raymond A. Thibodeaux
Audrey Turner
Herman Turner
George Tyer
Selma Tyer
Billy Tyson
Jo Ann Tyson
Martha Tyson
Robert Tyson
Jimmie L. Van Dyke
Virginia VanRanden
Clifton Warden
Hazel Warden
Albert J. Watson
Pauline Watson
Minnie Welch
Wilbur Welch
Anna Williams
Bonnie Rosa Williams, Adm. for
James D. Williams, deceased
Harold R. Williams, Sr.
Rose Williams
Virgil C. Williams, Sr.
Johnnie A. Williamson
Lenard W. Williamson
Oleta Williamson
Leonard Wing
Pearl Wing
Bertha Wright
Hollis L. Wright
Maurice Gerald Wright

Philip Wright
Carolyn Wych
Herbert Wych
Bobbie Y'Barbo
Richard D. Y'Barbo, Sr.
Geraldine York
J.C. York

Ada Bell
Russell Bell
Katherine Boalt
Terry Boalt
Howard A. Bowling
Iris Brisendine
Lowell T. Brisendine
Irvin Campbell
Cledith C. Carpenter
Donald Cross
Fannie L. Cross
Russell E. Crowell
Jackson L. Ellis
Romie A. Hodges, Jr.
Betty J. Holstein
Stan Holstein
Charles Jarrett
Lenore Jarrett
Beve G. Justice
William L. Kinder
Buford Marker
Sandra Marker
Dewey McCallister
Tressie McCallister
Betty B. McCord
Elsie G. McGrew
Goble Mundy
Mary Mundy
Harry E. Nelson
Cecil J. Ricketts

Eva Ricketts
Jenny Riddle
Roger Riddle
Wilford Roach
Georgia B. Smith
Thorl Smith, Sr.
Howard P. Taylor
Dorothy Thomas
Forrest Thomas
Harold Turley
Julia Vickers
Robert Vickers
Larry D. Waller

George N. Been
Hylmar Clifton
Henry Donaldson
Gary R. Frazier
Katheryn Lee Hall for
Wayman H. Hall, deceased
Oletha M. Hitt for Arnett D.
Hill, deceased
Rose E. Ruble
Woodford D. Skidmore
Donald L. Smith
Bernice H. Westfall

Ray Belle Adams
Jack Allen
Jacqueline Allen
Emary Alston
Frances Alston
Donald Anderson
Shirley Ann Anderson
Alberta Andrews
Willie Andrews
Laura Andrus, Adm. for
Raymond Andus, deceased
Laura Andrus

George Antoine
Gertie Mae Antoine
Earl Octabe Ardoin
Sadie Ardoin
Edina R. Arnoco
Della Mae Arnold, Adm. for
Robert P. Arnold, deceased
Della Mae Arnold
Edna Ruth Arnold
Edna Ruth Arnold, Adm. for
Johnnie E. Arnold, deceased
Rube Arnold
Rvay Arnold
Ora E. Arrington
Sylvia Arrington
Roy Lee Ashworth
Shirley Ann Ashworth
Genell Austin
Jack Alton Austin
Kerry Avie
Louella Avie
Ernesto Ridrigo Baca
Janice Baca
Jack Harvey Baird
Mary C. Baird
George Elliott Bankston
Lanell Bankston
Novelle Bankston
Woodrow W. Bankston
Donnie M. Barnes
Wilma Barnes
Jeanine Barnett
Michael Barnett
Dorothy Barrett
Mose Batiste
Beverly Beavens
Charles R. Beavens

O.C. Harrell Bell, Adm.
for Preston Bell, deceased
Mary Belt
Joseph Nolan Benoit
Mattie Gould Berry
Elton Berwick
Nadine Berwick
Perry Berwick
Clauzell Bishop
Bobby Boley
Eugenia N. Boley
Louella L. Bonin
Robert L. Bonin
Alean Booker
Lesley R. Booker
Billie Bourgeois
Flora M. Bourgeois
Murphy E. Bourgeois
Paul Justis Bourgeois
Bertha M. Broussard
Dallas Broussard
Edward Broussard
Leroy J. Broussard, Sr.
Leroy J. Broussard, Adm.
for Mary Z. Broussard, deceased
Olga O. Broussard
Sidney Broussard
Victoria Broussard
Alice Brown
Elizabeth Brown
Haywood Brown
James William Brown
Laurel Brown, Adm. for
Willis F. Brown, deceased
Laurel Brown
Minnie Ola Brown
Minnie Ola Brown, Adm. for
Carl Myrtis Brown, deceased

Thomas Howard Brown
Ganell M. Brunet
Leon Marvin Buckalew
Marilynn Burke, Adm. for
Garfield & Mary Vallow
Elsie Burns
Victor P. Burns
Robert Joseph Burroughs
Angeline Cammereri
Anthony T. Cammereri
Chester Campbell
Johnnie Cantu, Jr.
Ruth Cantu
Aubrey Wayne Carruth
Eva Mae Carruth
Etha Caudry
Alford Paul Chance
Carl Chance
Ellen L. Chance
Marie B. Chance
Alton D. Clark
Gladys Clark
Shirley Marie Clark
Wilmer Joseph Clark
Mildred Cogar
Thomas Cogar
Bessie V. Coker
Johnnie E. Coker
Everett Collier
Ruby Dell Collier
Charles Comeaux
Geraldine Cooper
James Wilburn Cooper
Vivian E. Cooper
Vivian T. Cordeau
James Coudrain, Jr.

Nancy Coudrain
Benjamin Delton Covington
Charlotte Covington
Elsie Credeur
Elwood J. Credeur
Mebaline Curtis
Ralph E. Curtis, Jr.
Jack Albert Cutler
Emmett G. Dammon
Hazel Dammon
George Wesley Daniels, Sr.
Sally Daniels
Willie Eugene Daniels
Cora O. Darby
Wesley Darby
Betty Jo Davenport
Francis Davenport
Francis Davenport, Adm. for
Earl L. Davenport, deceased
General Jimmie Davis
Harold Davis
Mercides Davis
Ruth J. Davis
Jack Day
Joyce Day
Alphonse Delcambre, Jr.
Leamon Dennis
Alton James Deyoung
Betty L. Deyoung
Bertha Dixon
Bertha Dixon, Adm. for
Orin Dixon, deceased
Joseph D. Dominique
Leroy Dorsey
Ardell Drake
Ardell Drake, Adm. for
Lemuel E. Drake, deceased
Cornelius Drake
Hazel Drake

Maydell Dubois, Adm. for
Dennis Dubois, deceased
Maydell Dubois
Lilly B. Ducote
George Oliver Dugas
Helen Dugas
Ovide Dugas
Patrick J. Dugas
George Duhon
Margie Duhon
Bonnie Duncan
Weldon Festus Duncan
James William Dunlap
Jeanetta Dunlap
June Pauline Dunnington
Guy Roy Duplantis
Lydia Duplantis
Cecil A. Eason
Ethel M. East
Nolan J. East
Edgar Eaton, Jr.
Edgar Eaton, Adm. for
Dora Eaton, deceased
Amos Raymond Edwards
Mary Ann Edwards
Mary Ann Edwards, Adm. for
Albert Edwards, deceased
Florine Emerson
Leroy Eubanks
Minnie Eubanks
Bertie Evans
Donald Vernon Evans
Dwanna Evans
Glen Milton Evans
Fannie Falgout
Leo Falgout
Jonathan Francis Fifield
Mildred Fifield

Herbert Findley
Kathleen Findley
Dorothy Fisk
Raymond Fisk
Jerry Flores, Adm. for
Frank W. Creel, deceased
Billie Bob Folsom
Sammie Jean Folsom
Ella Mae Fondren
Glyn Samuel Fondren
Cecile Fontenot
Noah Fontenot
Lissie Foreman
Tom Foreman
Beatrice Forma
James R. Forman
Frank Eugene Francis
Willie Francis
Ramona Frederick
Robert Frederick
Nelson Hamer Free
Opal Freeman
Jefferson J. Fuselier
Loyce Fuselier
Betty Fuss
John Howard Fuss
Alfred J. Garlington
Linda W. Garlington
Anthony Garrett
Viola Garrett
Alma Lois George
Morris George
John W. Gibson
Evelyn Gibson
Kenneth Eugene Gibson
Lillie Gibson
Carroll K. Gilchriest

Opal Gilchriest
Annie Goss
Charles Goss
Edna Gotcher
Edna Gotcher, Adm. for
Harvey E. Gotcher, deceased
Rosa Lee Jenkins Granger
Rosa Lee Jenkins Granger, Adm.
for Jack P. Granger, deceased
Jean Guidry
Margie Guidry
Adam Guilliame
Catherine Guilliame
Augustine Guillot, Sr.
Ida Guillot
Amy Hagler
James Daniel Hagler
Willie Mae Hailey
Mildred Hamm
Robert Melvin Hamm
Georgia Hardy
Vernie O'Neal Hardy
Doris B. Hargraves
Otis Leander Hargraves, Jr.
Fern W. Harper
Fern W. Harper, Adm. for
Charles D. Harper, deceased
Robert J. Harrington, Jr.
Betty J. Harris
James Hugo Harris
Rosalee Harris
Wanda Harris
Bayard Barward Harrison
Nellie Harrison
Herman Hart
Reo Hart
Roland Havens
Shirley Havens

Maidie L. Haynes
Oliver Beazley Haynes
Joyce Head
Raymond A. Head
Darlene Herbert
George Lea Hebert
Ronald J. Hebert
Yola Mae Hebert
Charles Hernander
Joe Angel Hernander
Theresa Hernandez
Viola Hernandez
William Harold Herrington
Walter Benjamin Hailey, Sr.
Wilton Higginbotham
Barbara Hoffpauir, Adm. for
Kenneth Hoffpauir, deceased
Barbara Hoffpauir
Sarah Hoffpauir
Walter Hoffpauir
Patsy J. Holievina
Pete Edward Holievina, Sr.
F.E. Hollins
Charles Henry Holloway
Jeannette Holloway
Christine Holstead
Thelbert Holstead
George Franklin Horton
Kathryn Horton
Lovelle Howard
Reba Howard
Anna Hughes
Bertie L. Hughes
Con Roy Hughes, Jr.
Waylon H. Hughes, Sr.
Ardy Cleveland Humble
Eva Mae Humble
Carl Hunt
Mary Lou Ivey

Thomas Hilton Ivery, Sr.
Neil O. Jackson, Adm. for
David C. Jackson, deceased
Neil O. Jackson
Othel Jackson
Dorothy James
Ernest James
Freeda Lucille James
Sam E. James
Loyce K. Jarrell
Elmer Jasper
Luthine Jasper
Claude Jaynes, Jr.
Erma D. Jaynes
Leslie Jeffers
Rose Jeffers
Louis Donald Jenkins
Ruby Jenkins
Birdie Jinks
Glasper Leonard Jinks
Andrew Johnson, Adm. for
Issiah Johnson Sr., deceased
Andrew Johnson
Daniel Johnson
Elma Wynona Johnson
Roy Johnson
Sadie Johnson
Sadie Johnson, Adm. for
Stanford Johnson, deceased
Sydney Johnson
William Johnson
Troy Johnston, Adm. for
Samuel P. Johnston, deceased
Troy Johnston
Alvin Jones
James Merwin Jones
Louise L. Jones

Louise L. Jones, Adm. for
Douglas Jones, deceased
Nancy L. Jones
Thelma Jones
Thelma Jones, Adm. for
John W. Jones, Jr., deceased
Alice J. Jules
John Wesley Jules
James Edward Kaske
Mary Kaske
Christine Kees
Minos Perry Kees
Evon Kennerly
Wilton Kennerly
Dewitt T. Kent
Lillie Kimmey
Lillie Kimmey, Adm. for
Joseph Kimmey, deceased
Harold William King
Syril C. King
Maey Jane Knight
Margaret Knighton
Robert Ragan Knighton
Gertie Lee Kyles
R.C. Kyles
Bonnie Marie Lambert
Eddie Joe Lambert
Gladys Land
Robert Lee Land
Etha Landry
Etha Landry, Adm. for
Harry J. Landry, deceased
Warren Landry
Rachel Larkins
Wilbert Larkins
Marhta Larned
Leonard Curtis LaSalle
Mary R. Lasalle
Mary Louise Latimer

Robert Latimer
Bobby G. Lawrence
Phyllis Lawarence
Enoch Leavings
Marie Leavings
Georgia Leblanc
Georgia Leblanc, Adm. for
Batson Leblanc, deceased
Joseph Herbert Leblanc, Sr.
Margaret Leblanc
Rosa Carlton Leblanc
Rosa Carlton Leblanc, Adm. for
Nelson A. Leblanc, deceased
Ethel Lebrun
Harvey A. Lebrun
John W. Lee
Joyce Lee
Lorene Lenormand
Therman Cleo Lenormand
Michael Joseph Leonard
Michael Joseph Leonard, Adm.
for Willis Guillory, deceased
Thelmer Nathanel Little
Dragica Lockhart
Everett Lockhart
Diana L. Lonion
Donald John Lonion
Annie Louviere
Norris Louviere
Joseph Adams Lupton
Lucille B. Lupton
Lottie Luster, Adm. for
Dewey Luster, Jr., deceased
Verlyne Lutgring
Verlyne Lutgring, Adm. for
Ralph Lutgring, deceased
King Shedrick Lyons
Louella Lyons

Louise Maggio, Adm. for
Louis Maggio, deceased
Charlotte Mahan
Ralph Truman Mahan
Albert Mallet
Lucille Mancil
Walter Mancil
Betty Pearl Marshall, Adm. for
Glen M. Marshall, deceased
Betty Pearl Marshall
Alfred James Martin
Eloise Martin
Philip Martin
Ruth Martin
Jeanne Matte
Matt Robert Matthews
Albert Maybou
Faye J. McCullough
Grady L. McCullough
Kathryn McDaniel, Adm. for
K.P. McDaniel, deceased
Kathry McDaniel
Anna Mae McGallion
Dalton McGallion
Jo Evelyn McGee, Adm. for
William Skelton, deceased
Jo Evelyn McGee
Helen Marie McGuire
Helen Marie McGuire, Adm.
for Jerry D. McGuire, deceased
Maxine McKinney, Adm. for
Flernoy McKinney, deceased
Viola McKinney
Willie McKinney
Jo Ann McKnight
Joe Dan McKnight, Sr.
Beulah McMahon

Beulah McMahon, Adm. for
James T. McMahon, deceased
Maxine McNeely
William James McNeely
Robert Dean Melton
Gloria Merendino
Louis Merendion
Norma Merritt
William Earl Merritt, Jr.
Daisy Mickles
Rhea Middleton
Rhea Middleton, Adm. for
Wheeler Middleton, deceased
Ella Miles
Ella Miles, Adm. for
Thomas Miles, deceased
Barbara G. Millican
Ronald Birgman Millican
Raymond DeWitt Mingle
Kathryn Mire, Adm. for
Roy Joseph Mire, deceased
Kathryn Mire
Geraldine Montgomery, Adm. for
Alfred Montgomery, deceased
Carol Harrison Moore
Dave M. Moore
Eda E. Moore
Emma E. Moore
Glenn Moran
Sylvia Moran
Georgia Morvant
Matthew George Morvant
Glenda Mouton
Wallace Mouton
Jack Mullen, Jr.
Mertie Mullen
Dionicio Solorzano Munoz

Rose Murphy, Adm. for
D.B. Murphy, deceased
Charley Nesbitt
Elizabeth A. Nesbitt
Mary Nevay, Adm. for
Wilbert Nevay, deceased
Mary Nevay
Bobbie M. Newman
Dorothy Newman
Marion Newman
William James Newman
George Nix
Jake C. Norman, Sr.
Elishia Odom
Robert Bradfield Officer
Eva Oglesbee
Tom Donald Oglesbee
Elsie Oliver
Johnnie Odis Oliver
Amy Oubre, Adm. for
Whitney B. Oubre, deceased
Amy Oubre
Dorothy M. Owens
Fred M. Owens
Rosanna Owens
Welton Owens
Grace Pabon
Ramon Pabon
Drullie G. Paine
Holllis B. Paine
Henry Parker
Lois Marie Parker
Mary Parker
Mary Parker, Adm. for
Alvie L. Parker, deceased
Alice Pastorella
Carlo Pastorella
Patricia Sue Patterson

Terrance Alfred Patterson
Freeman Eugene Peart
John Eva Peart
Betty L. Peddy
Thomas Ray Peddy
Florence Pelts
William H. Pelts
Jess W. Phillips, Sr.
Arthur Leonard Philpott
Geneva L. Philpott
Alice Pickens
Henry Langham Pickens, Sr.
Ivy Lee Pickett
Ivy Lee Pickett, Adm. for
Reuben B. Pickett, deceased
Algier Pitre, Sr.
Sadie Mae Pitre
Sadie Mae Pitre, Adm.
for Marks Pitre, deceased
Bibian Poche
Oza Posey
Raymond Delaine Posey
Patrick Paul Powers
Gladys Gail Prejean, Adm.
for Nailes Prejean, deceased
Gladys Gail Prejean
John Prescott
Albert Joseph Prosperie, Jr.
Anora H. Proudhomme
Anora H. Proudhomme, Adm.
for James Proudhomme, deceased
Howard Pruett
Ruby M. Pruett
Ruby Randle
Ruby Randle, Adm. for
Gus Randle, deceased
Eloile Read

Wesley Ansel Read
Jay Reed, Sr.
Mary B. Reed
Albert P. Reese
Eli Reese
Everett L. Reese
Marian D. Reese
Othella Reese
Willie V. Rhode
Willie V. Rhode, Adm.
for Otto V. Rhode, deceased
Harry Lloyd Rhodes
Lucille Rhodes
Mayoine A. Rhodes
John M. Richard
Corine W. Richardson
Eula Mae Rizzo
Luke Rizzo
Mary L. Robberts
Mary Sue Robberts, Adm. for
John T. Robberts, deceased
Mary Sue Robberts
Ronald G. Robberts
Clark Lewis Robbs
Velma Robbs
Dorothy B. Roberts
Edwin Allen Roberts
Betty Rogers
Lige Glean Rogers
George Romero
Janine Romero, Adm. for
Simonet Romero, deceased
Joyce Romero
Josephine Ross
Walter Anthony Ross
James Runte
Joyce K. Runte
John O. Sampson

Marvin Carol Sanders
Ola A. Sanders
Dannie Mae Saunders, Adm. for
Elbert W. Saunders, deceased
Franklin L. Scales
Jackie Schell
Rodney Vernon Schell
Glynn Schildknecht
Ella Schroeder
Ella Schroeder, Adm. for
Herbert Schroeder, deceased
James A. Scott
Phoebe Scott
Dorothy Self
William Dave Self
Max Shaw
Hugh Lavell Simmons
Jessie M. Simmons
Rebecca Sinegal
Rebecca Sinegal, Adm.
for Morris Sinegal, deceased
Evelyn M. Skinner
Virgil Lee Skinner
Delores V. Smith
Fred Douglas Smith
Herbert H. Smith
Jimmie C. Smith
Leo Earl Smith
Miriam C. Smith
Mary Ellen Sosa
Louvean Sparks, Adm. for
Edwin Sparks, deceased
Louveen Sparks
Audrey M. Standley
Juanita B. Standley
Paul Ray Standley
Thomas Howard Standley

Carl Stanley
Emogene Stanley
Garland Stanley
Lloyd Stanley
Mattie Stanley
Vera Stanley
Alfred Stelly
Marion Stiles
Mary Stiles
Anita Strange
William Charley Strange
Billie Tallarita
Labo Tallarita
L.D. Tarver
Mildred Tarver
Atwood Reid Taylor
Edna Taylor
Joseph E. Theriot
Mary Theriot
Katherine Thibault
Lester James Thibault
Dennis C. Thomas, Jr.
Lola Grace Thomas
Mary Thomas
Willie Thomas
Claude Thompson
Earl Dean Thompson
Jo Ann Thompson
Glen Ernest Thorn
June Thorn
Kizzie Timmons
Norris Timmons
Helen Tolivar
James Tolivar, Sr.
Elza Joseph Touchet
Leander Touchet
Lela Touchet
Lilly Touchet

Ethel Dugas Toups
Ethel Dugas Toups, Adm. for
Alton Toups, deceased
John A. Trahan
Laura Trahan
Calvin James Trosclair
Miriam Trosclair
Francis Raymond Tuory
Calvin Turner
Mary Jane Vandygriff
Mary Jane Vandygriff, Adm. for
Shelah Vandygriff, deceased
Jessie Vanwright
L.C. Vanwright
A.C. Vaughan, Jr.
Elizabeth N. Vaughan
Catalina Villareal
Luciano Luis Villareal
Charles Emery Waddell
Frances Waddell
Homer Waddell
Trilby Waddell
Lucy Walker
Verna Mae Calcote Wallace
Mary Walles
Reed Walles
Bell Thomas Walters, Adm. for
Steve Walters, deceased
Bell Thomas Walters
Dawn Wilbur Warner
Patricia Warner
Betty K. Webb
Robert Mathew Webb
Martin L. Welch
Gervis T. Weldon
John Wells
A.C. White
Gloria White

Samuel M. Wilburn
Emery C. Wilkerson
Mary Willey
Charlie Williams
Cynthia Ramona Williams
Estoline Williams
James Franklin Williams
Joseph H. Williams, Jr.
Mary Williams
Steve Williams, Jr.
Thelma G. Williams
Tillman A. Williams
Betty Jean Williamson, Adm. for
William Williamson, deceased
Betty Jean Williamson
Charles R. Willingham
Carolyn M. Wilson
Raymond A. Wilson
Edgar Raymond Windsor
Sallie J. Windsor
Martin Wishard
Nora Wishard
Thelma Yoast, Adm. for
Samuel J. Yoast, deceased
Thelma A. Yoast

APPENDIX B

Respondents

Best Insurors, Inc.
Best Insurors of Mississippi, Inc.
Coast to Coast Advertising, Inc.
Computer Holdings Corporation
Dixie Building Supplies, Inc.
Hamer Holdings Corporation
Hamer Properties, Inc.
Homes Holdings Corporation
Jim Walter Computer Services, Inc.
Jim Walter Homes, Inc.
Jim Walter Insurance Services, Inc.
Jim Walter Resources, Inc.
Jim Walter Window Components, Inc.
JW Aluminum Company
JW Resources, Inc.
JW Resources Holdings Corporation
J.W.I. Holdings Corporation
J.W. Walter, Inc.
JW Window Components, Inc.
Land Holdings Corporation
Mid-State Homes, Inc.
Mid-State Holdings Corporation
Railroad Holdings Corporation
Sloss Industries Corporation
Southern Precision Corporation
United Land Corporation
United States Pipe and Foundry Company
U.S. Pipe Realty, Inc.
Vestal Manufacturing Company
Walter Home Improvement, Inc.
Walter Industries, Inc. (formerly Hillsborough Holdings Corporation)
Walter Land Company

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 90-163-MISC-T-15

IN RE:
HILLSBOROUGH HOLDINGS CORPORATION et al.,
Plaintiffs,

v.

THE CELOTEX CORPORATION, et al.,
Defendants.

O R D E R

Before the Court is the "Asbestos Defendants" motion to withdraw reference of Bankruptcy Adversary Proceeding No. 90-0003. (D-11) In the adversary proceeding, the Debtors seek a declaration that the corporate veil between Jim Walter Corporation (JWC) and Celotex may not be pierced to make JWC liable for any successful asbestos-related personal injury claims, as well as a declaration that the transaction in which Walter Industries exchanged shares for assets of JWC was not a fraudulent conveyance. These claims mirror the claims in an action filed by the Asbestos Defendants in Texas state court in 1989.

The Court has already found that the issues involved in this adversary proceeding are "core" proceedings pursuant to 28 U.S.C. §157(b)(2). (D-43) However, the Court deferred ruling on the present motion until the Bankruptcy Court ruled on a pending summary judgment motion. The Bankruptcy Court recently denied the summary judgment motion and is ready to set this matter for trial, pending this Court's ruling on the motion to withdraw reference.

Section 157(d) of Title 28 of the United States Code provides in part that "The district court may withdraw, in whole or in part, any case or proceeding referred under this section on its own motion or on timely motion of any party, for cause shown." The cause upon which the Asbestos Defendants base their motion for withdrawal of reference is their claim that they are entitled to a jury trial. In order to accept their argument, the Court must find both that the Bankruptcy Court does not have the authority to conduct jury trials, and that the Asbestos Defendants are entitled to a jury trial.

Circuit Courts of Appeal are in disagreement as to whether the Bankruptcy Courts can conduct jury trials. *In the Matter of Grabill Corp.*, 967 F.2d 1152, 1153 (7th Cir. 1992) (Jury trials in Bankruptcy Court permissible in 2d Circuit but not in 6th, 7th, or 8th Circuits.) The Eleventh Circuit has not announced a ruling on this issue. Nor has the Supreme Court offered guidance on the subject, aside from holding that a bankruptcy filing cannot be used to deprive parties of their 7th Amendment right to jury trial. *Granfinanciera, S.A. v. Nordbert*, 492 U.S. 33, 50 (1989).

Fortunately, this Court need not second guess the Eleventh Circuit because the Court finds that Asbestos Defendants are not entitled to a jury trial on the issues presented in the adversarial proceeding. The two basic issues in the adversary proceeding are first, whether the corporate veil which separated JWC and its subsidiary, Celotex can be pierced and second, whether the transfer of assets, via a leveraged buyout, between Walter Industries and JWC was a fraudulent conveyance.

In order to determine whether the above issues preserve the Asbestos Defendants right to jury trial the Court must first compare the present action to 18th Century actions available in English courts when courts of law and equity were still separate. *Granfinanciera*, at 42. The second, and

more important step is to determine whether the remedy sought is legal or equitable in nature. *Id.*

Applying the analysis set forth in *Granfinanciera* to the present case, the Court first finds that although actions to pierce the corporate veil may currently be brought in courts of law, they were historically brought in courts of equity. *See e.g. Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1974). Furthermore, the actual remedy sought, a determination to ignore a legal fiction and find that the assets of the parent are the assets of the subsidiary, is at its essence an equitable remedy. *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 59 (2d. Cir. 1988).

As for the fraudulent conveyance action, the Supreme Court has stated such actions seeking monetary relief could historically be brought in courts of law. *Granfinanciera*, at 43. However, the Court distinguished fraudulent conveyance actions seeking monetary relief from those seeking other equitable remedies, such as those the Asbestos defendants seek here. *Id.* at 43-46. Basically, the Asbestos Defendants seek the return of intangible assets, stock, from one corporation to another. That remedy is clearly equitable in nature. *Granfinanciera*, at 44 (citing G. Glenn, Fraudulent Conveyances and Preferences §98, pp 183-84 (rev. ed. 1940).

In sum, the Court finds that the although the Asbestos Defendants could have their claims heard by a jury, they are not constitutionally entitled to a jury trial on those claims.

Accordingly, it is ORDERED:

The Asbestos Defendants motion to withdraw reference (D-11) is DENIED.

DONE AND ORDERED at Tampa, Florida this 15th day of September, 1992.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Chapter 11
Case No. 89-9715-8P1 through 89-9746-8P1
and 90-11997-8P1

In re:

HILLSBOROUGH HOLDINGS CORPORATION, et al.,
Debtors.

Adv. No. 90-0003 and 90-0004

In re:

HILLSBOROUGH HOLDINGS CORPORATION, et al.,
Plaintiffs,

vs.

THE CELOTEX CORPORATION, et al.,
Defendants.

ORDER STRIKING ASBESTOS CLAIMANTS' DEMAND FOR JURY TRIAL ON VEIL PIERCING CLAIM

THIS CAUSE came on for consideration upon Debtors' Motion for an Order Striking Asbestos Claimants' Demand for Jury Trial on the Veil Piercing Claim (the "Motion"). Subsequent to the filing of this Motion, an Order was entered on September 15, 1992, by United States District Judge Ralph W. Nimmons, Jr., denying the Asbestos Defendants' Motion to Withdraw Reference. The Order

recites the issues involved in the above-styled adversary proceeding and determines that the Asbestos Defendants are not constitutionally entitled to a jury trial on their claims. The Court finds that said Order is dispositive of the issues raised in Debtors' Motion and that no further hearing is necessary. It is therefore

ORDERED, ADJUDGED and DECREED that the Debtors' Motion for an Order Striking Asbestos Claimants' Demand for Jury Trial on the Veil Piercing Claim be, and the same is hereby, granted.

DONE AND ORDERED at Tampa, Florida, on Oct. 7, 1992.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 90-163-MISC-T-15

IN RE:

HILLSBOROUGH HOLDINGS CORPORATION et al.,
Plaintiffs,

v.

THE CELOTEX CORPORATION, et al.,
Defendants.

O R D E R

Before the Court is the "Asbestos Defendants" Motion for Reconsideration or in the Alternative for Certification of Interlocutory Appeal oi Order Denying the Motion to Withdraw Reference. (D-70) Upon review of that motion and of the Debtors' response (D-71) the Court declines to reconsider the defendants motion to withdraw reference.

Nor does the Court find that the issue raised by the Asbestos defendants, that is whether they are entitled to a jury trial in the bankruptcy adversary proceeding, is a controlling question of law as to which there is substantial ground for difference of opinion.

Accordingly, it is ORDERED:

The Asbestos Defendants motion for reconsideration or in the alternative for certification of interlocutory appeal (D-70) is DENIED.

DONE AND ORDERED at Tampa, Florida this 23rd day of February, 1993.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-2219

IN RE:

ASBESTOS VICTIMS,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

---

BEFORE: TJOFLAT, Chief Judge, FAY and BLACK, Circuit Judges.

BY THE COURT:

The petition for writ of mandamus is denied.

STAMPED:

FILED

US COURT OF APPEALS
ELEVENTH CIRCUIT
APR 19 1993
MIGUEL J. CORTEZ
CLERK

Supreme Court, U.S
FILED
AUG 18 1993
OFFICE OF THE CLERK

No. 93-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALVIN T. ADAMS, SR. et al.,

Petitioners,

—v.—

WALTER INDUSTRIES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DON M. STICHTER
Stichter, Riedel, Blain
& Prosser, P.A.
100 Madison Street
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QUESTION PRESENTED

Should this Court issue a writ of certiorari to review the lower court's exercise of its discretion in denying—without opinion—a Petition for Writ of Mandamus seeking a jury trial, when Petitioners' *own pleadings* in this and in other lawsuits showed that the issues to be tried were equitable?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-83

Alvin T. Adams, Sr., et al.,

Petitioners,

vs.

Walter Industries, Inc., et al.,

Respondents.

BRIEF FOR RESPONDENTS WALTER INDUSTRIES, INC. AND CERTAIN OTHER DEBTORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondents are Walter Industries, Inc. (formerly Hillsborough Holdings Corporation) and all the other debtors in certain administratively-consolidated Chapter 11 cases ("Debtors") pending in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division.[1] Respondents respectfully submit that after three lower courts have considered the Petitioners' arguments

1. Respondents' statement pursuant to Rule 29.1 is Appendix A to this Brief.

after three lower courts have considered the Petitioners' arguments and rejected them in unpublished decisions, this case does not merit any further review.

Contrary to the Petition, the question here is *not* the right to a jury trial in a personal injury lawsuit. Debtors are not trying to deprive Petitioners of jury trials on personal injury claims. Personal injury claims are being asserted—and tried to juries—in other, separate lawsuits against other parties.

The absence of any damages claims in this action is the result of a choice *by the Petitioners*. Before Debtors' bankruptcy, in 1989, the Petitioners decided to pursue a two-track strategy. On one track were personal injury claims, litigated against asbestos manufacturers. The other track involved an attempt to use the equitable powers of the courts to undo the leveraged buyout (or "LBO") of the Jim Walter Corporation. This second track sought to create an equitable fund from which unsatisfied judgments—that might be obtained in the future in other lawsuits against other parties—might be paid.

That two-track strategy continued when the Debtors went into bankruptcy. The Petitioners did not assert *any* counterclaims for damages in this adversary proceeding. They did not file *any* claims for damages in this bankruptcy. At every step of these proceedings they made it clear that they did *not* want their personal injury claims tried in this action. The only things they wanted decided in this action were technical corporate law questions.

Thus, contrary to the Petition, this case does not raise any question about the right to a jury trial on personal injury claims or claims for damages. It raises only the question about the right to a jury trial on the peculiar facts of this case, given a procedural posture developed in multiple lawsuits over a number of years.

Also contrary to the Petition, there is no dispute about the law that governs these issues. Every court that has considered this or similar issues agrees that the controlling law is the time-honored analysis most recently set forth in this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). That analysis looks primarily to the nature of the remedy sought in each particular case. Differences in decisions arise from differing sets of facts, not from conflicts on the law.

Nor is there any reason to find that this settled law was misapplied in this case. Three separate courts have applied the analysis set forth in *Granfinanciera* to the facts of this case. Those three courts rejected the Petitioners' claims, and all three did so in unpublished opinions.

Respondents submit that the application of settled law to particular facts, in unreported decisions, does not justify review by this Court. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Jim Walter Corporation

This case arises from the 1987 leveraged buyout of the Jim Walter Corporation ("JWC"). JWC had its start in 1946, when Jim Walter and Lou Davenport founded "Davenport & Walter," building and selling homes with completed exteriors and unfinished interiors. By 1987 JWC had grown to a New York Stock Exchange company with $2.43 billion in revenues.

One of JWC's subsidiaries was The Celotex Corporation ("Celotex"), which it acquired in the early 1960s. In 1972 Celotex bought Panacon Corporation ("Panacon"). Celotex had never been named as a defendant in an asbestos related action, but after that acquisition Celotex was repeatedly named as a defendant in such lawsuits, primarily based on Panacon's pre-1972 activities. By

1987, approximately 59,000 such suits were pending against Celotex.

In July 1987, following an auction in which several substantial bidders—including a group affiliated with CitiBank and a group led by PaineWebber—made competing bids for JWC, the Board accepted a bid of $60 per share from a group led by the investment firm of Kohlberg Kravis Roberts & Co.

The acquisition of JWC and its subsidiaries was completed in early 1988. As a result Hillsborough Holdings Corporation, later named Walter Industries, acquired ownership of virtually all of JWC's subsidiaries. Celotex was sold to a third-party in April 1988.

The 1989 Lawsuits

In early 1989, a purported class action lawsuit was filed against Walter Industries in United States District Court in Beaumont, Texas: *Cimino et al. v. Raymark Industries, et al.* That suit sought to pierce the corporate veil between Celotex and JWC and create a fund from which future claimants might seek payment if their damage claims against Celotex—being litigated in other lawsuits—were not satisfied. Significantly, at the time the suit was filed there had never been an unsatisfied damage judgment against Celotex. The entire thrust of *Cimino* related to future claims against Celotex that *might not* be completely satisfied.

The District Court in *Cimino* recognized that this claim raised corporate law issues, and was not an asbestos personal injury claim. The court severed the corporate law claims from the personal injury claims against other defendants, including Celotex. The Petitioners did not object.

In July 1989 the asbestos claimants filed a lawsuit in state court in Beaumont, Texas: *Larned et al. v. Kohlberg, Kravis, Roberts & Co. et al.* As with *Cimino*, the *Larned* lawsuit did not

assert any asbestos personal injury claims. All the plaintiffs in the *Larned* action already had personal injury claims pending against Celotex in other courts. The relief sought in *Larned* was equitable: creation of a fund that might be used—in the future—to pay unsatisfied judgments against Celotex. When *Larned* was filed there had never been an unsatisfied personal injury judgment against Celotex. The entire thrust of *Larned* was the future, seeking an equitable structure that might be used to pay judgments obtained in personal injury cases in other courts.[2]

The HHC Bankruptcy

Respondents filed for bankruptcy on December 27, 1989, due to a potential default in approximately $624 million high-yield bonds issued in connection with the LBO. In early January 1990, Respondents filed this adversary proceeding. They sought a declaratory judgment that the corporate veil between JWC and Celotex could not be pierced and that there was no basis for a fraudulent conveyance claim against them. They named as defendants Celotex and the individual asbestos plaintiffs who had sued any of the Respondents.

Petitioners filed an answer denying the relief sought. But they did not counterclaim for damages; they did not suggest that the action involved any claims for damages.

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2. When the *Larned* complaint was filed, counsel for Petitioners stated:

> The class action itself will not yield any damages for those three [named class representatives] or for the other asbestos victims, but attempts to make sure that money will be available for damage payments for asbestos victims winning lawsuits against Celotex and Jim Walter.

Asbestos Victims Seek Corporation Liability, UPI, July 13, 1989, *available in* LEXIS, Nexis Library, UPI File.

In fact, although Petitioners included a *pro forma* jury demand in their answer, they sought affirmative *equitable* relief. Their Answer concludes with this clause: "WHEREFORE, the Asbestos Defendants request that the Court dismiss the complaint for lack of jurisdiction. In the alternative, they request that the Court enter judgment in their behalf, *that it declare the rights and legal relations of the parties hereto*, and that it award costs, attorneys fees and such other relief as the Court deems appropriate in the circumstances." (emphasis added).

Summary Judgment Proceedings

After discovery, Respondents moved in April 1992 for summary judgment limited to the veil-piercing claim. On August 25, 1992, the Bankruptcy Judge issued a decision. He denied complete summary judgment, finding disputes as to certain factual inferences. He found, however, as permitted by Fed. R. Civ. P. 56(b), that certain facts were without dispute. These included:

- Under a centralized cash management system, Celotex had its own bank accounts, "collected its own receivables and paid its own payables. . . ." *See* Appendix B at A-9.
- Celotex had its own Board of Directors, its own minute books and its own accounting records. *Id.* at A-11.
- JWC officers monitored the performance of subsidiaries through a reporting structure but "did not perform management functions or act in a decision-making capacity . . . ." *Id.* at A-12.

The full scope of the decision can be seen in this statement by the Bankruptcy Court:

> What is involved is an attempt to destroy the separate legal existence of an entity which was properly created

and functioned as a bona fide corporation, which fully complied at all times with all the formalities required by applicable law. *Id.* at A-14.

The Bankruptcy Court concluded that although the underlying facts were undisputed, certain limited inferences from those facts should be resolved by trial. Trial is set for December 13, 1993.

The Jury Trial Issues

The Petitioners moved to withdraw the reference, on the grounds that they were entitled to a jury trial on the veil-piercing claims. They relied on the Second Circuit's decision in *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131 (2d Cir. 1991). The District Court, in an unreported decision, found that *Passalacqua* did not apply in this case, because the nature of the relief being sought was plainly equitable, unlike *Passalacqua*. *See* Petitioners' Appendix at 34a.

The Petitioners sought a writ of mandamus from the Eleventh Circuit, which was denied without opinion. *See* Petitioners' Appendix at 40a. The Petitioners did not seek rehearing, nor did they ask the Eleventh Circuit to clarify the grounds for its decision. Their failure to seek clarification was not due to any sense of urgency; they waited the full 90 days permissible before filing their Petition.

REASONS NOT TO GRANT THE WRIT

SUMMARY

Petitioners ask this Court to grant review based on nothing but speculation. They suggest that review might be proper: "*if*" the Eleventh Circuit ruled on the merits of their Seventh Amendment jury trial claim; or "*if*" the Eleventh Circuit ruled on the general availability of mandamus in these types of cases; or "*if*" the

Eleventh Circuit ruled that mandamus would lie *if*, and only *if*, Petitioners could show that they had a "clear and indisputable" right to a jury trial.[3] "There are too many 'ifs' in that proposition to make review appropriate at this stage." *California v. Rooney*, 483 U.S. 307, 312-13 (1987)(per curiam)(dismissing writ of certiorari as improvidently granted).

The Petition's arguments about conflicts among the circuits have no basis in the record. *First*, there is no dispute among the circuits about the law to be applied. Every court cited by Petitioners has applied the analysis most recently set forth in this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989): (i) was the form of action in law or in equity in the Courts of England in 1791, and (ii) is the nature of the relief being sought legal or equitable. The only issue on this Petition is whether courts below properly applied that analysis to the facts of this case.

The Second Circuit's decision in *Passalacqua* does not create a conflict on the law.[4] It merely applied the analysis set forth in *Granfinanciera* to a different set of facts. A difference resulting

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3. *See* Petition for a Writ of Certiorari, at 9, 12-14 (hereafter "Petition")(speculating: "If the Eleventh Circuit's denial of mandamus rested on a determination that petitioners have no constitutional right to a jury trial"; "if the Eleventh Circuit's denial of mandamus rests on a determination that mandamus is not generally available to review the improper denial of a jury trial"; or "If the Eleventh Circuit accepted respondents' alternative contention that mandamus should be denied because petitioners did not show a 'clear and indisputable' right to a jury trial").

4. Petitioners note that several courts have allowed jury trials in veil-piercing actions. *See* Petition at 10 n.5. As the District Court observed, simply because veil piercing *may* be tried to a jury does not mean the Seventh Amendment *requires* it.

from the application of settled law to differing sets of facts does not create a "conflict" between the circuits.

Indeed, even if the Eleventh Circuit did silently reject the Second Circuit's discussion of legal history in *Passalacqua*, that would not create a conflict. Without a second appellate decision that addresses the question, this Court lacks "the reasoned alternatives from which . . . [it] can derive a more informed analysis." J.C. Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Cal. L. Rev. 913, 929 (1983). This is particularly true on a subject as obscure as the types of action available in equity and law in 18th century England.

The Petitioners suggest that since there is no way to find a conflict from the face of the Eleventh Circuit's order, this Court should force the Eleventh Circuit to write an opinion to give the Petitioners something to work with. Last term the Eleventh Circuit decided over 1,000 cases by summary order. If failure to write an opinion is grounds for granting certiorari, then this Court's case-load has just become unmanageable.

Second, there is no conflict about the use of mandamus to correct the erroneous denial of jury demands. No circuit has deviated from this Court's admonition in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), that it is "the responsibility of the Federal Courts of Appeals to grant mandamus *where necessary* to protect the constitutional right to trial by jury." 369 U.S. 469, 472 (1961)(emphasis added). The Seventh Circuit has tried to define "necessity" in jury trial situations. *See First National Bank of Waukesha v. Warren*, 796 F.2d 999, 1001-06 (7th Cir. 1986) (Easterbrook, J.). Several other circuit panels have used different language in describing the standards to be used in evaluating requests for mandamus. But differences in language, in *dicta*, have

never warranted certiorari review. "This Court 'reviews judgments, not statements in opinions.'" *Rooney*, 483 U.S. at 311 (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

It is thus clear that there is nothing for this Court to review. There is no conflict about the legal analysis to be used in judging the merits. There is no conflict about the standards used in mandamus cases. And on the merits, the lower courts were clearly correct. The Petition should be denied.

I. THERE IS NO INTERCIRCUIT CONFLICT OVER PETITIONERS' LACK OF A SEVENTH AMENDMENT RIGHT TO JURY TRIAL

The proper legal standard to be used in determining if there is a right to a jury trial is not in dispute. Well-established, it was most recently set forth by this Court in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989), in which this Court quoted *Tull v. United States*, 481 U.S. 412, 417-18 (1987); *see also Curtis v. Loether*, 415 U.S. 189, 196 (1974). The analysis requires the court to look at the historical roots of the cause of action and at the nature of the relief sought. The only question raised by the Petition is whether that settled law was properly applied to the facts in *this* case involving particular claims to pierce the corporate veil.

Petitioners point to the Second Circuit's decision in *Passalacqua*, the only circuit court to address a veil-piercing claim. They argue that, *if* the Eleventh Circuit denied their mandamus request on the merits of their Seventh Amendment claim, *then* the ruling conflicts with the Second Circuit's decision in the *Passalacqua* case. That is wrong. Both cases applied the same law, but to different facts.

In *Passalacqua*, the Second Circuit held that because the historical origins of veil piercing were unclear,[5] and the remedy sought in that case—*the enforcement of a sum certain judgment*—appeared to be legal, the Seventh Amendment required a jury trial. 933 F.2d at 136. As required by this Court's decision in *Granfinanciera*, the Second Circuit focused on the nature of the remedy in the case before it. Given that the remedy sought in this case is different from that sought in *Passalacqua*, it is not surprising that the results were different. That difference does not create a "conflict."

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5. The Second Circuit looked at the old two-part creditors' bill:

> The first part was *a proceeding in equity* "instituted by any creditor with an unsatisfied judgment, usually on behalf of all creditors, against the corporate debtor," the purpose of which was to adjudge the extent of total corporate liability to the group of creditors. Blumberg, *The Law of Corporate Groups* § 2.02 at 53. The second part was an action at common law against the shareholders individually to collect the amount owed in which only personal defenses were allowed to be raised.

933 F.2d at 136 (emphasis added).

This historical analysis was mistaken. In fact, Professor Blumberg was referring to the evolution of the creditors' bill in the United States. *See* P. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 2.02 at 52-53 (1987). The relevant inquiry is about *British* legal history. *See Granfinanciera*, 492 U.S. at 42.

But even if the *Passalacqua* analysis were correct, that would not change the result here. *Passalacqua* recognized that the first part of the creditors' bill was *clearly equitable*. And that first part of the creditors' bill is clearly analogous to this case: an action on behalf of all creditors to adjudge the extent of total corporate liability.

II. THE DECISIONS BELOW WERE CORRECT; PETITIONERS HAVE NO SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Although the Petition tries to characterize the issue here as a "conflict," in fact the Petitioners are asking this Court to review this case to see if settled law was properly applied. That would be a waste of this Court's resources; the courts below were correct.

In determining whether the Seventh Amendment requires a jury trial in a particular case, a court must first compare the subject action to "'18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.'" Then, the court should "'examine the remedy sought and determine whether it is legal or equitable in nature.' The second stage of this analysis is more important than the first." *Granfinanciera*, 492 U.S. at 42. That analysis was followed by the courts below.

A. The Pleadings In This Action Seek Equitable Relief; Consistent With The *Larned* Complaint, The Petitioners Did Not Ask For Damages

Petitioners have continuously mischaracterized the proceedings below. This is not a personal injury action. The Adversary Proceeding does not address the merits of any products liability claim. Those who seek damages for asbestos-related injuries will continue to pursue their legal remedies in direct claims against Celotex and others.

Respondents seek a judgment declaring that the corporate veil separating Celotex from JWC was intact. This action is clearly equitable. There is no reference to damages in the complaint—or in the answer. Indeed, the Petitioners' Answer seeks only equitable relief, not damages, by way of counterclaim.

Determining the nature of the claims in this action requires looking beyond the fact that it is a declaratory judgment action. "Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988).

The issue is thus how the veil-piercing claim in this case would be treated if it had been brought as an affirmative claim by the Petitioners. That is simple. The Petitioners had already brought an affirmative action dealing with these issues—*Larned*—and it was clearly equitable.

In *Larned*, the Petitioners sought to pierce the corporate veil. They did not seek damages.[6] They sought an injunction, an accounting, a reconveyance of assets, a receivership and a constructive trust, all of which are traditionally equitable remedies.

Petitioners would now like to re-characterize *Larned* as a personal injury class action against JWC. *See* Petition at 21 n.13. That attempt comes rather late. In earlier pleadings in this action counsel for the Petitioners denied that either *Larned* or the Adversary Proceeding was a tort suit for asbestos-related injuries. He stated on January 22, 1990, that "[t]his is not a personal injury action. . . . The *Larned* case—is an action seeking a Court Order piercing the corporate veil." Then, in the Asbestos Defendants'

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6. There was an alternative request for damages but only as a substitute for equitable relief. The *Larned* complaint asked that if assets had been transferred and were beyond the court's equitable powers, damages be awarded as compensation. But even this damage award would have gone into some type of trust to pay unspecified future claims. Not a single member of the class had any claim when *Larned* was filed that they had been damaged in any amount.

Statement of Grounds for Objections to the Bankruptcy Judge's Proposed Findings of Fact and Conclusions of Law and Recommendation Concerning Their Motion for Abstention, counsel stated:

> *Cimino* is one of literally thousands of garden variety tort cases asserting liability for asbestos injuries. Like many such cases, it includes allegations of veil piercing to Jim Walter which have never been pursued. . . . *Cimino* is a "red herring." . . . It is the *Larned* action, not *Cimino*, that the Debtors are trying to avoid . . . [*Larned*] is undoubtedly the state action that is at issue.

Based on the words of counsel for Petitioners, this is an action involving claims for equitable relief by both parties. It is not a personal injury action. It does not involve claims by either party for a sum certain. These facts alone resolve the jury trial issue, no matter what the historical analysis might show.

B. Piercing The Corporate Veil Is Historically An Equitable Action

In fact, the historical analysis supports the lower courts. In this area the Petition is inaccurate on two points. First, it suggests there were common law antecedents to piercing the corporate veil. There were none. Second, it claims that there was no equitable right to pierce the corporate veil. In fact, by 1791 there were established equitable remedies against shareholders who abused the corporate form.

1. There was no right to pierce the corporate veil at common law; in fact the common law precluded any such action

Petitioners admit that the doctrine of piercing the corporate veil has *no* roots in the English common law as it existed prior to 1791. *See* Petition at 16 and 18 n.11.

Lacking a common law pedigree for veil piercing, they create one. They adopt *respondeat superior* and agency as their rightful lineage, but do not cite a single authority linking those doctrines and piercing the corporate veil. *See* Petition at 17-18 & n.11. If *respondeat superior* and agency were legal substitutes for equitable veil-piercing, it is truly surprising that not a single case or commentator from the 18th or 19th century noted this fact.

Citing Professor Blumberg, Petitioners argue that veil piercing "closely resemble[s] *respondeat superior* and agency," and thus is legal by analogy. *Id.* But Professor Blumberg's own language defeats this claim. He notes that the concept of agency, as used in veil-piercing cases, is merely "metaphorical":

> [T]he term has no precise meaning. The courts employing the term have simply concluded for reasons unrelated to a consensual common law agency relationship that the parent and subsidiary for legal purposes constitute a single entity, thereby supporting the imposition of liability on the parent. *By contrast, in the common law agency cases, the concepts of principle and agent recognize the separateness of the two entities.*

P. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 6.06.2 at 128 (1987)(emphasis added).

In fact, far from permitting actions to pierce the corporate veil, the common law affirmatively precluded such actions. Blackstone stated:

> *The debts of a corporation*, either to it or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities: agreeable to the maxim of the civil law, "si quid universtati debetur, singulis non debetur; nec, quod debet universitatis, singuli debent."

1 William Blackstone, Commentaries * 472.

Subsequent commentators noted "that, although Blackstone's statement was merely that the members are not liable after dissolution, the maxim which he quoted in explanation stated that they are not liable at all." E. Dodd, *American Business Corporations Until 1860* 85 (1954). *See also* 8 W. Holdsworth, *A History of English Law* 203-04 (1937)("As early as the fifteenth century it was clear that an individual corporator was not personally liable for the debts of the corporation."); A.B. DuBois, *The English Business Company After the Bubble Act, 1720-1800* 146 n.51 (1938)(quoting *A Letter to a Member of Parliament Touching the Late Intended Bank* (1721))("A particular member of an incorporated society, cannot, by the rules of Law, be sued nor any action grounded against him for a debt which is not due from him in particular, but from the whole society in general."); *see also Edmunds v. Brown & Tillard*, 1 Lev. 237, 83 Eng. Rep. 385 (1668)(no action lies at common law against shareholders of dissolved corporation on corporate debt); *Case of the City of London*, 1 Ventr. 351, 86 Eng. Rep. 226 (1680)("a duty or charge upon a corporation, every particular member thereof is not liable").

The same rule held true in America. *See* 2 J.S. Davis, *Essays in the Earlier History of American Corporations* 317 (1917); J.K. Angell & S. Ames, *A Treatise on the Law of Private Corporations Aggregate* 349 (1832)("No rule of law we believe is better settled, than that, in general, the individual members of a private corporate body are not liable for the debts, either in their persons or in their property, beyond the amount of property which they have in the stock.")

2. By 1791 the English courts of equity had a well-established jurisprudence permitting actions against shareholders who abused the corporate form

Unable to show a basis in common law for veil piercing, Petitioners make the unsupported claim that veil piercing did not originate in the English Courts of Equity. *See* Petition at 16. They are mistaken. Precisely because there was no relief at law, the Chancellor provided remedies against corporate shareholders as early as the late 17th Century, beginning with *Dr. Salmon v. The Hamborough Company*, 1 Ch. Cases 204 (1671).

In that case, the Hamborough Company borrowed £2000 from Dr. Salmon and then defaulted. With no remedy at law, Dr. Salmon filed a bill in the High Court of Chancery, naming the Corporation and several shareholders personally. At first, the Chancellor dismissed the plaintiff's bill because: (1) the corporation had nothing distrainable; and (2) the shareholders were not personally liable. *See* 1 Ch. Cases at 204-05.

On appeal, the House of Lords reinstated the bill and directed the Chancellor to order the corporate officers to:

> make such a Leviation upon every Member of the said Company as is to be contributory to the Public Charge, as shall be sufficient to satisfy the said Sum to be decreed

> to the Plaintiff in that Cause, and to collect and levy the same, and to pay it over to the Plaintiff as the Court shall direct. . . . [A]nd so many of them as by the Constitution of the said Charter do make a *Quorum*, shall not make or return such Leviations, as aforesaid the Lord Chancellor or Lord Keeper may issue Process of Contempt against them, as is usual against Persons in their Capacities.

Id. at 207. *See also Harvey v. East-India Company*, 2 Vernon's Cases in Chancery 396 (1700)("In the case between *Dr. Salmon* and the *Hamborough Company*, the members in their private persons were made liable, the *Company* having no goods.").

Dr. Salmon was quintessentially a veil-piercing case. A court of equity held shareholders accountable for corporate debt, even though they were *not* personally liable at law. One scholar has argued that the *Salmon* doctrine was an early creditors' remedy against corporate fraud. *See* D. Jenkins, *Skinning the Pantomime Horse: Two Early Cases on Limited Liability*, 34 Cambridge L.J. 308 (1975)("lifting the veil is no modern innovation and . . . [*Dr. Salmon* is] properly to be understood in terms of a lifting of the veil so as to defeat the wrongful use of the real personality of a corporation.").

Dr. Salmon is a direct precursor to the present litigation. Petitioners seek to pierce the Celotex veil on the theory that JWC stripped Celotex of assets in order to defraud contingent creditors of Celotex. Florida law, which controls in this case, similarly requires that a plaintiff prove shareholder fraud before a court will pierce the corporate veil. *See Dania Jai-Alai Palace, Inc. v. Sykes*,

450 So.2d 1114, 1117-21 (Fla. 1984). Not much has changed in three hundred years.[7]

By the end of the 17th century, the chancellor imposed trusts upon shareholders who had taken corporate dividends or capital in fraud of creditors.[8] *See Naylor v. Brown*, Rep. Temp. Finch 83, 23 Eng. Rep. 44 (1673).[9] Put in modern terms, equity was dealing

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7. *Dr. Salmon* was not the isolated case Petitioners suggest. *See* Petition at 18 & n.12. In fact, "[*Dr. Salmon*] remained law throughout the eighteenth century." O. Handlin & M. Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1, 13 (1945).

8. Directly on point in early American jurisprudence is Justice Story's discussion in his *Commentaries on Equity Jurisprudence, As Administered in England and America* (Boston 1836).

> Thus, for example, the capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation; and no shareholder can entitle himself to any dividend or share of such capital stock until all the debts are paid. And if the capital stock should be divided, leaving any debts unpaid, every shareholder, receiving his share of capital stock, would in Equity be held liable pro rata to contribute to the discharge of such debts out of the fund in his own hands.

Id. at 499; *see also Wood v. Drummer*, 3 Mason 308, Fed. Cas. No. 17,944 (1824)(doctrine has "long been established"); *cf. Vose v. Grant*, 15 Mass. Rep. 505, 521 (1819)(dismissing common law action against shareholders of a bank but discussing available remedy in equity). Thus, it was well established in early 19th century America that equity offered the sole remedy against shareholders who had taken corporate funds to the detriment of creditors.

9. Petitioners claim that the "corporate trust fund" doctrine "has never been recognized in England, nor does it exist under the common law." Petition at 18 n.12 (quoting 15A W. Fletcher, T. Bjur & J. Reinholtz, *Fletchers' Cyclopedia of the Law of Private Corporations* § 7371 at 55 (1990)). Naturally, a wholly equitable doctrine was not recognized at common law. And Fletcher's statement that it was not recognized in English equity is wrong, given the early English decision in *Naylor v. Brown*, Rep. Temp. Finch 83, 23 Eng. Rep. 44 (1673).

with a claim that the shareholders had "stripped" the corporation of its capital, which is the essence of both the Adversary Proceeding and the *Larned* action.

Concerns for efficiency and basic fairness were strong policy reasons for limiting direct actions against shareholders to courts of equity. One British legal historian has observed:

> [T]he indirect imposition of liability in Salmon's case was an equitable decision; and it has been noted that *a suit in equity accomplished the establishment of a fund for creditors where a plea at common law has failed.* These powers in company and partnership law had been acquired by the Court of Chancery in the course of some centuries because its particular organization made it much more efficient than the common law courts in dealing with funds. Where a cause arose concerning relations of parties concerned in a fraud or estate, and accounts had to be taken in consideration, the Court of Chancery was able to go farther and with greater ease than the common law. There was an action at common law but it had very limited application and even where it could be used the *superior machinery and remedies of the Chancery gave the court a practical monopoly of the field.*
>
> By reason of this *virtually exclusive jurisdiction the field of company law was dominated by equity* and the actual legal ownership of the capital fund mattered little so long as the equitable interests of the members in the fund were firmly established.

C.A. Cooke, *Corporation, Trust and Company* 84 (1950)(emphasis added).

Justice Story's *Commentaries on Equity Jurisprudence*, discussing equitable trusts, states:

> This, however, is a remedy, *which can be obtained in Equity only; for a Court of Common Law is incapable of administering any just relief*; since it has no power of bringing all the proper parties before the Court, or of ascertaining the full amounts of the debts, the mode of contribution, the number of the contributors, or the cross equities and liabilities, which may be absolutely required for a proper adjustment of the rights of all parties, as well as of the creditors.

Story, at 499-500 (emphasis added).[10]

These considerations remain as valid today as they were in 1791. Indeed, this case is a clear example of why the flexibility of a court's equitable powers is an essential part of this Seventh Amendment analysis. *Cf. Ross v. Bernhard*, 396 U.S. 531, 538 n.4 (1970) (considering the "practical abilities and limitations of juries" as a potential factor in Seventh Amendment analysis); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987)(same). Petitioners are seeking to "unwind" an LBO of a company with over $2 billion in assets. Although JWC was the only shareholder of Celotex, piercing

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10. *See also* Angell & Ames, at 351, noting that claims against shareholders should be limited to equity, because of the joint and several liability provisions of common law tort actions. If an action at common law were allowed:

> the consequences would be [that] "any of the stockholders might be sued alone: because in an action founded on tort, it is not necessary to join all the wrongdoers: and the defendant cannot, in such a case, plead the omission of the others in abatement. Secondly, the individual who was sued would be liable to the whole extent of the injury complained of, without regard to the amount which he had received on the division of the stock."

Id. (quoting *Vose v. Grant*, 15 Mass. Rep. 505, 521 (1819)).

the corporate veil would affect the rights of multiple debt issuers, thousands of creditors, and a variety of equity holders, as well as previous holders of JWC stock. That difficult task belongs in equity today, just as it did in 1791.

III. THERE IS NO CONFLICT ABOUT THE APPROPRIATE STANDARD TO USE IN EVALUATING PETITIONS FOR MANDAMUS WHERE JURY TRIAL ISSUES ARE RAISED

After devoting a substantial amount of the Petition to arguing the merits, the Petitioners do a 180-degree turn and ask this Court to *assume* that the Eleventh Circuit did *not* deny their mandamus request on the merits. Under this alternative theory, the Petitioners argue that their petition for mandamus was denied because the Eleventh Circuit found: (1) they have an adequate remedy by direct appeal; or (2) they failed to establish their right to a jury trial by clear and indisputable proof. *See* Petition at 13-14.

According to Petitioners, either rationale creates a circuit split. Of course, since no one knows the basis for the Eleventh Circuit's ruling, Petitioners' argument can only create a conflict by conjecture. Since this alleged conflict is also directly contrary to the first half of the Petition, it is clear that they are asking this Court to create a conflict where none exists from the face of the Order.

In fact, there would be no conflict even if the Eleventh Circuit had used the language the Petition suspects could have been used. The Petition's "conflict" consists of nothing more than different circuit courts using different language to express the same two concepts: (i) mandamus is a discretionary remedy and (ii) the right

to a jury trial is an important right that should be protected. Differences in words do not require this Court's intervention.[11]

A. There Is No Conflict About The Nature Of Mandamus; It Is An Inherently Discretionary Remedy

The law is clear that mandamus is a discretionary remedy. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980)(per curiam); *see also Mallard v. United States District Court*, 490 U.S. 296, 309 (1989); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). Additionally, those seeking mandamus must show that without it, they lack an adequate appellate remedy, *see Mallard*, 490 U.S. at 309; *Allied Chemical*, 449 U.S. at 36, and that they have a "clear and indisputable" right to the relief they seek by mandamus. *See Mallard*, 490 U.S. at 309;

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11. Even if there are conflicts in the language used to describe the appropriate standards for mandamus on the issue of right to a jury trial, that does not merit review by this Court. *See* R.B. Ginsburg & P.W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417, 1434 n.96 (1987).

First, this type of conflict will not spawn forum shopping. It is unlikely that a party will choose a circuit on the basis of that jurisdiction's particular forumlation of the mandamus standard. *See*, M.F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1256 (1989); S. Estreicher & J.E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 725 (1984).

Second, because mandamus is an interlocutory *trial procedure*, this conflict does not in any way affect multi-circuit parties' substantive transactions. *See* Sturley, 67 Tex. L. Rev. at 1270-71; Estreicher & Sexton, 59 N.Y.U. L. Rev. at 725; J.C. Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Cal. L. Rev. 913, 930 (1983).

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953)(citation omitted).

Unless this Court is to impose an automatic right to appeal whenever a jury trial claim is asserted, mandamus will remain a discretionary form of review. Given that fact, it is difficult to see how varying the words used to describe that review will have an influence on decisions by circuit courts.

This does not mean that this Court's decisions on the right to a jury trial are being disregarded. The lower courts all understand the fundamental importance of that right. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), this Court stated that it is "the responsibility of the Federal Courts of Appeals to grant mandamus *where necessary* to protect the constitutional right to a trial by jury." *Id.* at 472 (emphasis added).

However, Petitioners take this language, and language contained in *Ex Parte Simons*, 247 U.S. 231, 239 (1918), and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959), and try to create an automatic interlocutory appeal—as-of-right—from *any* denial of a jury demand. *See* Petition at 22. That is not what this Court has held.

Simons, *Beacon Theatres* and *Dairy Queen* are examples of the proper use of mandamus. In all three cases, mandamus was appropriate due to the absence of an adequate appellate remedy. *See Beacon Theatres*, 359 U.S. at 504-05; *see also First National Bank of Waukesha v. Warren*, 796 F.2d 999, 1003-04 (7th Cir. 1986). This Court did not create an automatic appeal as of right for all jury trial claims.

B. There Is No Conflict About The Grant Of Mandamus In Jury Trial Matters

Petitioners contend that other courts have created an automatic right to appeal and that the failure to grant them such a right in this case is a "conflict" between the circuits. *See* Petition at 13-14. They misread those cases. Although the language varies, these opinions apply normal mandamus standards. To the extent that they deal with the right to a jury trial, they recognize its importance without creating an automatic appeal.[12]

The Petition cites a Seventh Circuit decision holding that the use of mandamus is appropriate when "a clear right to a jury [can]not be vindicated on appeal." *First National Bank of Waukesha v. Warren*, 796 F.2d at 1006; *see also Mallard*, 490 U.S. at 309; *cf. In re Don Hamilton Oil Co.*, 783 F.2d 151 (8th Cir. 1986)(holding that clear and indisputable legal right is necessary for mandamus). This is not a conflict. If it is clear that an important

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12. *See Wilmington Trust v. United States District Court*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1578 (1992)(mixed question of law and admiralty is directly analogous to *Beacon Theatres* and the same rationale applies); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir.1983)(same); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982)(no discussion of mandamus standards and superseded by *In re Don Hamilton Oil Co.*, 783 F.2d 151 (8th Cir. 1986)); *Maldonado v. Flynn*, 671 F.2d 729 (2d Cir. 1982)(no discussion of mandamus standards); *In re Zweibon*, 565 F.2d 742 (D.C. Cir. 1977)(remanded for district court to consider timely jury demand); *In re Union Nacional de Trabajadores*, 502 F.2d 113 (1st Cir. 1974), *opinion withdrawn*, 527 F.2d 602 (1st Cir. 1975)(right to jury trial in criminal case); *Eldredge v. Gourley*, 505 F.2d 769 (3d Cir. 1974)(per curiam)(same fact pattern as *Beacon Theatres*); *Filmon Process Corp. v. Sirica*, 379 F.2d 449 (D.C. Cir. 1967) (no clear and indisputable legal right); *General Tire & Rubber Co. v. Watkins*, 331 F.2d 192 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964)(holding, without discussion, that "exceptional circumstances" did not exist); *Black v. Boyd*, 248 F.2d 156 (6th Cir. 1957)(writ issued to avoid foreclosure of appellate remedy by collateral estoppel).

right *cannot* be vindicated on appeal, then one of the basic requirements of mandamus has been met: no adequate remedy on appeal. The Seventh Circuit did not, however, state that mandamus was proper even if there was *no* showing of a lack of adequate remedy on appeal.

Petitioners are pointing to conflicts in words, not judgments. That does not merit review. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)("this Court reviews judgments, not opinions"); R.L. Stern, E. Gressman & S.M. Shapiro, *Supreme Court Practice* § 4.3, at 196 (6th ed. 1986)("there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized").

CONCLUSION

This case will not resolve any principles of law or settle any conflicts. The facts are so unique, and the law so controlled by those facts, that a resolution of this case would do nothing but resolve *this case*. It is not this Court's role to sit as the *fourth* chance for Petitioners to argue their claims. Accordingly, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Dated:New York, New York
August 18, 1993

Respectfully submitted,

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APPENDIX

APPENDIX A

RESPONDENTS RULE 29.1 STATEMENT

A. *Debtors*

Walter Industries, Inc. (formerly Hillsborough Holdings, Inc.)
Best Insurors, Inc.
Best Insurors of Mississippi, Inc.
Coast to Coast Advertising, Inc.
Computer Holdings Corporation
Dixie Building Supplies, Inc.
Hamer Holdings Corporation
Hamer Properties, Inc.
Homes Holdings Corporation
Jim Walter Computer Services, Inc.
Jim Walter Homes, Inc.
Jim Walter Insurance Services, Inc.
Jim Walter Resources, Inc.
Jim Walter Window Components, Inc.
JW Aluminum Company
JW Resources Holdings Corporation
J.W.I. Holdings Corporation
J.W. Walter, Inc.
JW Window Components, Inc.
Land Holdings Corporation
Mid-State Homes, Inc.
Mid-State Holdings Corporation
Railroad Holdings Corporation
Sloss Industries Corporation
Southern Precision Corporation
United Land Corporation
United States Pipe and Foundry Company
U.S. Pipe Realty, Inc.
Vestal Manufacturing Company
Walter Home Improvement, Inc.
Walter Land Company
JW Resources, Inc.

B. *Direct and Indirect Parents of the Debtors*

Kohlberg Kravis Roberts & Co.
KKR Partners II, L.P.
JWC Associates, L.P.
JWC Associates II, L.P.

C. *Direct and Indirect Subsidiaries of the Debtors*

JW Aluminum Company
Homes Holdings Corporation
JW Resources Holdings Corporation
JW Window Components, Inc.
Vestal Manufacturing Company
Sloss Industries Corporation
Southern Precision Corporation
Mid-State Holdings Corporation
United State Pipe and Foundry Company
Railroad Holdings Corporation
Computer Holdings Corporation
Jim Walter Computer Services, Inc.
Land Holdings Corporation
Walter Land Company
J.W.I. Holdings Corporation
J.W. Walter, Inc.
U.S. Pipe Realty, Inc.
Hamer Holdings Corporation
Hamer Properties, Inc.
Jim Walter Window Components, Inc.
Walter Home Improvement, Inc.
Jim Walter Homes, Inc.
Best Insurers, Inc.
Best Insurers of Mississippi, Inc.
Jim Walter Insurance Services, Inc.
Mid-State Homes, Inc.
Coast to Coast Advertising, Inc.
United Land Corporation
Dixie Building Supplies, Inc.

Jim Walter Resources, Inc.
Jefferson Warrior Railroad Company, Inc.
U.S. Industrial Products, Inc.
Cardem Insurance Co., Ltd.
Black Warrior Methane Company
Black Warrior Transmission Company

D. *Other Entities*

The Celotex Corporation
Jim Walter Corporation
Drexel Burnham Lambert Group, Inc.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case Nos. 89-715-8P1 through 89-9746-8P1

In re:

HILLSBOROUGH HOLDINGS CORPORATION, et al.,

Debtors,

Adv. No. 90-0003

HILLSBOROUGH HOLDINGS CORPORATION, at al.,

Plaintiffs,

v.

THE CELOTEX CORPORATION, et al.,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS IS an adversary proceeding commenced in these yet-to-be-confirmed Chapter 11 cases of Hillsborough Holdings Corporation (HHC), now known as Walter Industries, Inc. (Walter Industries), and its 31 wholly-owned subsidiaries (collectively referred to as the Debtors). In this connection, it should be noted that none of the Chapter 11 cases have been substantially

consolidated, although procedurally the Debtors have been treated as a group as the matter involved impacts the interests of all the debtors.

The Debtors in their Complaint named as defendants Celotex Corporation (Celotex), Jim Walter Corporation (JWC), and hundreds of individuals (collectively referred to as Asbestos Claimants) who claim to have suffered personal injuries as the result of exposure to asbestos products manufactured and distributed by Celotex. Celotex was formerly a wholly-owned subsidiary of JWC but did not become part of the group which emerged after the leveraged buy-out (LBO) which ultimately produced HHC, now known as Walter Industries, the primary Debtor in this Chapter 11 case and the lead Plaintiff in this adversary proceeding.

In Count I of the Complaint, the Debtors seek a declaration by this Court that the corporate veil between Celotex and JWC cannot be pierced. In Count 11 of the Complaint, the Debtors seek a declaration that the LBO, a result of which all subsidiaries of JWC, with the exception of Celotex, have been acquired through intermediaries by HHC, now known as Walter Industries, was not a fraudulent transfer. In Count III, the Debtors seek a declaration by this Court that under applicable law, they are not the successors in interest (sic) to the asbestos-related personal injury claims asserted against JWC or Celotex. In Count IV, the Debtors seek a declaration by this Court that under applicable law, they are not liable for the asbestos-related liabilities of either JWC or Celotex.

The immediate matter under consideration is a Motion For Partial Summary Judgment filed by the Debtors. It is the contention of the Debtors that there are no genuine issues of material fact and they are entitled to the relief they seek in Count I of the Complaint, i.e., a declaration that the corporate veil between Celotex and JWC cannot be pierced as a matter of law. The Motion does not involve

the second prong of their attack on the LBO based on the theory of fraudulent transfer.

In order to place the Motion in the proper context and also in the proper procedural posture, a recap of the undisputed facts as they appear from the record should be helpful.

PRE-BANKRUPTCY LITIGATION

In July, 1989, Cimino and Larned, two residents of Texas, filed their respective suits seeking damages for personal injuries based on their claimed exposure to asbestos products allegedly manufactured and distributed by Celotex. The Cimino suit was filed in United States District Court in the Eastern District of Texas, Beaumont, Division. it is styled *Cimino, et al. v. Raymark Industries, et al.*. The Larned suit, styled *Larned, et al. v. Kohlbrg, Kravis, Roberts & Co., et al*, was originally filed in the State Court in Jefferson County, Texas. In due time JWC removed the *Larned* action to the U.S. District Court in the Eastern District of Texas.

Both actions were filed as class actions. However, before either of these suits reached the point of certification of the class, these suits came to halt by virtue of the fact that the Debtors, who were also named as defendants in both suits, filed their respective Petitions for Relief under Chapter 11, on December 27, 1989. This in turn automatically triggered the operation of the automatic stay imposed by § 362 of the Bankruptcy Code and stopped any further proceedings against the Debtors in the two Texas litigations.

In this connection, it should be noted that Celotex, one of the lead Defendants in the two lawsuits, was not a Chapter 11 debtor at the commencement of the Texas suits, or even when the Debtors filed this adversary proceeding. However, it later became a debtor itself when it filed its own Petition for Relief under Chapter 11 of

the Bankruptcy Code on October 12, 1990. Its Chapter 11 case is still pending in this District, albeit not before this Court.

THE COMPLAINT FOR DECLARATORY RELIEF

Shortly after the commencement of the Chapter 11 cases filed by HHC and its subsidiaries, the Debtors filed this adversary proceeding, No. 90-0003. As noted earlier, in this adversary proceeding the Debtors named as Defendants Celotex and JWC, in addition to Cimino and Larned and all others who were the putative members of the classes yet to be certified in the two Texas lawsuits. Even a cursory reading of the Complaint filed by the Debtors in this Court leaves no doubt that it is really nothing more than the flip side of the Texas lawsuits in which Cimino, Larned and the other Asbestos Claimants sought to pierce the corporate veil between Celotex and JWC, and once this is accomplished, to proceed to attack the LBO as a fraudulent transfer in order to be in a position to assert their personal injury claims against the former assets of JWC which were acquired by the Debtors and their subsidiaries through the LBO.

Before discussing the facts relevant to the Motion under consideration, it should be noted that all parties agreed that the right of the Asbestos Claimants to pierce the corporate veil of Celotex is a threshold issue, the resolution of which will without doubt have a profound impact on not only the Chapter 11 cases of the Debtors but also on the fate of Celotex. Accordingly, all parties sought and obtained relief from stay in the Chapter 11 case of Celotex for the limited purpose of litigating the issue of piercing the corporate veil of Celotex.

HISTORICAL DEVELOPMENT OF THE DEBTORS

In 1946, Mr. James W. Walter joined with Mr. Lou Davenport and formed a partnership for the purpose of building and selling shell homes with completed exteriors and unfinished interiors. Mr. Davenport left the business which was then carried on by Jim Walter, initially as a sole proprietor, under the name of Walter Construction Company. In 1955, Jim Walter incorporated the business under the name of Jim Walter Corporation (JWC).

By 1963, JWC had purchased 61% of the outstanding shares of Celotex common stock, and by 1964, JWC had completed its acquisition of Celotex and Celotex became a wholly-owned subsidiary of JWC. JWC also acquired controlling interests in several other corporations, and by 1970 had become a pure holding company for numerous subsidiaries employed in various business activities including coal and marble mining, and the manufacturing of gypsum board, building materials, and cast iron and ductile pipe.

In April of 1972, Celotex acquired a controlling interest in The Panacon Corporation (Panacon) with $62 million advanced by JWC. Shortly thereafter, Celotex and Panacon merged with the unanimous written consent of the Board of Directors of Celotex and Panacon. At the time of the acquisition by Celotex, Panacon had revenues of $181.1 million, not income of $10.6 million and assets of $106 million in 1971, and employed 5500 people.

In 1974, the Federal Trade Commission (FTC) sued JWC for violation of § 7 of the Clayton Act (15 U.S.C. § 18) in connection with Celotex's acquisition of Panacon. The opinion rendered by the FTC was limited to anti-trust matters and determined that the corporate identity of Celotex should be disregarded for the purposes before the FTC. However, *in dicta* the FTC stated that "we do not imply that the separate incorporation of JWC and Celotex should be disregarded for all purposes; that must be determined in light of

the applicable facts and legal principles in each case." The FTC opinion was vacated by the Fifth Circuit Court of Appeals in 1980.

Beginning in the mid-1970's numerous suits were filed against Panacon by parties who claimed to have been injured as the result of alleged exposure to products distributed and sold by Panacon which contained asbestos. After the merger, Celotex was also named as a defendant in numerous law suits filed by asbestos-related personal injury claimants. A great majority of these law suits alleged liability based on pre-1972 activities of Philip Carey Corporation, a predecessor-in-interest of Panacon, which in 1969 merged into the Briggs Manufacturing Company, and which ultimately became the surviving corporation, Panacon.

METHOD OF OPERATION/CASH MANAGEMENT SYSTEMS

JWC established a central cash management system in the 1970's for all of its wholly-owned subsidiaries. Under this system all excess cash generated by the subsidiaries was transferred to the central cash management account maintained by JWC in Tampa. According to the Debtors the system was established in order to maximize the efficient use of the pooled funds of the subsidiaries. The pooled funds were used first, to pay the bills of the subsidiaries and also to provide intercompany loans at rates mare favorable than those which could be obtained by the subsidiary from outside institutional lenders. Celotex collected its own receivables and paid its own payables, albeit with funds transferred from the cash management account of JWC. Celotex maintained a checking account always with a zero balance, but used same with full credit accorded through inter-company receivable and payable accounts. According to the Debtors, the cash management system was nothing more than "a revolving credit/working capital loan agreement between JWC and its subsidiaries." (Matlock Supp. Aff. II @ 5)

Celotex had separate bank accounts that operated through lock box arrangements, and Celotex customers sent their payments to the lock box. At the end of each business day, the funds in Celotex accounts were wire transferred to a JWC account, and Celotex received a credit for the funds transferred. Celotex handed disbursements in a similar manner. Celotex decided which bills it would pay, and when it would pay those bills. The bank with which Celotex had its accounts would notify the treasury department of JWC when a Celotex check was presented to the Bank for collection, and JWC would wire transfer funds from a JWC account to cover all checks that were presented to the Bank on that day. JWC and Celotex, like all other subsidiaries of JWC, made separate debit and credit entries in their books to account for all receipts and disbursements.

Celotex maintained an inter-company payable account and an inter-company receivable account with JWC pursuant to the cash management system. According to the Debtors, the records reflected at all times the balance between Celotex and JWC, including the amount of funds borrowed by Celotex from JWC at any given time, and the amount of funds owed to Celotex by JWC. This accounting system required that all the subsidiaries in Jwc maintain strict and separate accounting records for each transaction. Moreover, even individual divisions of subsidiaries also maintained separate records of inter-company payables and receivables under the central cash management system. According to the Debtors, it was understood that all loans by JWC to the subsidiaries were to be repaid by the subsidiaries with interest even though none of these loans were documented as ordinary loan transactions, i.e., by execution of promissory notes payable on demand or with fixed due dates under fixed finance charges. Whether the transfer of these funds was actually repayment of loans as claimed by the Debtors or instead, was return of capital to JWC, as claimed by the Asbestos

Claimants, is one of the central issues involved in the Motion under consideration. In this connection, it should be noted that the undisputed fact that these finds were immediately credited against the balance owed by Celotex to JWC under the cash management system does not necessarily compel the conclusion urged by the Debtors that this represented the repayment of inter-company loans.

As part of the cash management system, JWC recouped the interest costs it incurred on money it borrowed from third parties and then in turn, loaned to its subsidiaries through a corporate assessment. The corporate assessment was an interest charge designed to recover JWC's cost of borrowing cash which was used by Celotex and other subsidiaries. The corporate assessment also included a charge to reimburse JWC for the cost of centralized and corporate services provided to the subsidiaries by JWC. The corporate assessment rate was set at the beginning of each year. Between 1982 and 1987, Celotex paid to JWC corporate assessments in the amount of $126.3 million. According to the Debtors, the interest rate associated with the corporate assessment rate was well below any interest rate that Celotex and the other subsidiaries could have obtained on the open market.

CORPORATE GOVERNANCE

Each subsidiary had separate corporate minute books and separate accounting records and employees. However, while Celotex hired or fired its lower level employees, decisions concerning senior management required approval by the JWC Board. Each operating company handled all its own promotions, except for those which called for a substantial deviation from established practice. Each Subsidiary had its own payroll, and paychecks were issued on accounts in the subsidiary's corporate name. It should be noted that Celotex had its own Board of Directors which generally acted by written consent and rarely met face-to-face.

The Board of Directors of JWC monitored key events of Celotex and other subsidiaries, and provided oversight functions. The Board of JWC discussed certain issues affecting Celotex, including the acquisition and construction of plants, the closing or sale of plants, the acquisition or transfer of assets and the like. However, the Board of Directors of JWC was not involved in the day-to-day operations of the subsidiaries.

JWC established profit centers which were composed of subsidiaries or divisions of subsidiaries to facilitate efficient reporting. Profit centers were designated as operating groups along certain business lines, or in a manner to reflect common business consideration such as product lines, marketing, distribution, or geographic location. For internal purposes, JWC reported the financial status of subsidiaries and divisions by profit center. However, public financial reports were issued for each subsidiary, not for profit centers.

JWC monitored the performance of subsidiaries through its reporting structure. A JWC officer would serve as a liaison between JWC and the subsidiary for reporting purposes. Each officer was assigned to a number of profit centers and would discuss the financial status and operating reports of the entities in that profit center, after which time the officer would report this data to senior management of JWC. The JWC officers did not perform management functions or act in a decision-making capacity for their respective profit centers.

DIVESTITURE OF ASSETS BY CELOTEX

It is without dispute that between 1981 and 1983, Celotex lost over $70 million due to the severe economic recession which heavily impacted the construction industry. During this time period, the inter-company liability of Celotex reached $291 million. Beginning in 1982, Celotex established a divestiture program and sold 26 of its divisions and subsidiaries to JWC, other JWC subsidiaries and unrelated third parties. These sales produced $165 million which, according to the Debtors, was used by Celotex to reduce its inter-company liability to JWC. According to the Asbestos Claimants, these sales resulted in Celotex's divestiture of approximately half of its assets, although this Court is unable to determine the precise impact of the sales in Celotex's not worth based on this record.

CONTENTIONS OF ASBESTOS CLAIMANTS

The divestiture of assets by Celotex is the heart of the Asbestos claimants claim that the corporate veil of Celotex should be pierced and JWC should be liable for the personal injury claims of the Asbestos Claimants. The central point of this claim is based on the allegations that JWC, the parent, misused and disregarded the separateness of JWC and Celotex and orchestrated the methodical divestiture of valuable assets of Celotex and then funnelled the proceeds of these sales in the guise of repayment loans to JWC which, according to the Asbestos Claimants, were at most a return of capital and not repayment of bona fide loans.

The Asbestos Claimants contend that there are genuine issues of material fact which would prevent the disposition of the controversy in favor of the Debtors as a matter of law. In the alternative, they contend that under the applicable legal principles, the Debtors are not entitled to a judgment as a matter of law, even if the Court finds that there are no genuine issues of material fact.

A close analysis of the undisputed facts of this record, together with the argument of the Asbestos Claimants leaves no doubt that they really do not challenge the historical facts, but that they certainly draw different inferences and conclusions from those facts. The classic scenario under which attempts have been made to pierce the corporate veil involve a closely-hold corporation where creditors of the corporation seek to impose personal liability on the principals of the corporation. *See, e.g., Sampsell v. Imperial Paper & Color Corp.*, 303 U.S. 215, 85 L. Ed. 1293, 61 S. Ct. 904 (1940). However, this is not what is involved in the matter under consideration. What is involved is an attempt to destroy the separate legal existence of an entity which was properly created and functioned as a bona fide corporation which fully complied at all times with all the formalities required by applicable law. Notwithstanding, the Asbestos Claimants contend that the cash management system, the divestiture of assets, and the alleged total domination and control of JWC over the affairs of Celotex may warrant piercing the corporate veil of Celotex, if they are given an opportunity to establish their claims at a full scale evidentiary hearing.

In resolving this matter, it should be noted at the outset that one of the basic principles of American corporate law is the rule that a properly formed corporation is an independent and separate legal entity with a life of its own from not only those who originally formed the corporation, but also from any shareholder, including a corporation who owns shares in another, i.e., parent and wholly-owned subsidiaries. *See, e.g., Cancun Adventure Tours, Inc., v. Underwater Designer Co.*, 862 F.2d 1044, 1047 (4th Cir. 1988). In order to destroy the independence and separateness of the validly-created legal entity, either under the law of Delaware, the place of incorporation of Celotex, or under the laws of this state, it is the claimant's burden to establish 1) that the shareholder

dominates and controls the corporation to such an extent that the corporation has no independent existence; 2) the corporate form must have been used fraudulently or for an improper purpose; and 3) the fraudulent or improper use of the corporate form must have caused the claimant injury. *See In re Rodriguez*, 895 F.2d 725, 796, n.6 (11th Cir. 1990); *Dania Jai-Alai Palace, Inc. v, Sykes*, 450 So. 2d 1114 (Fla. 1984); *Mobil Oil Corp. v. Linear Films Inc.*, 718 F. Supp. 260 (D. Del. 1989).

The principles governing disposition of controversies without trials, Fed. R. Civ, P. 56, has been adopted by Bankruptcy Rule 7056 in toto. Clearly, the principles which govern the application of Fed. R. Civ. P. 56 are equally applicable if motions for summary judgment are filed in a bankruptcy court, either in the context of an adversary proceeding or in a contested matter pursuant to F.B.B.P. 9014.

Based upon this voluminous record one might at first blush conclude that the limited aspect of the adversary proceeding concerning piercing of the corporate veil may be resolved as a matter of law, based on the assumption that through the extensive discovery, one might rightfully conclude that there are indeed no genuine issues of material fact. However, this is not an ordinary veil piercing case and, upon careful consideration of the entire record this court concludes that resolving this precise and narrow issue under consideration as a matter of law would not be proper and fair for the following reasons.

The most crucial aspects of this controversy are (1) the precise manner of the operation of the cash management system, (2) the record-keeping account activities by JWC and its subsidiaries, including Celotex, and (3) most importantly, the extent of the control exercised by JWC over the affairs of Celotex, especially the extent of JWC's involvement in the decision-making process of the

divestiture program of Celotex referred to earlier. Specifically, this Court must determine whether the sales by Celotex of its divisions were done for legitimate business purposes or thether they were done solely for the purpose of denuding Celotex of assets in order to keep those assets out of the reach of the Asbestos Claimants and to funnel the proceeds of these sales to JWC. This, in turn, brings into consideration whether or not the transfer of funds derived from the divestiture of Celotex's assets and those made in connection with the cash management system were, in fact, repayment of bona fide loans, loans which were properly documented, or nothing more than a return of equity to JWC.

Although it appears that some of the material facts are undisputed, the parties dispute the inferences which may be drawn from those facts. As the Eleventh Circuit Court of Appeals has stated, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then a court should deny judgment." *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). Therefore, this Court is satisfied that the Motion For Summary Judgment must be denied. Further, in light of the fact that all these questions involve the mental attitude of the principal players and the subjective motivation of the parties involved, it would be improper to resolve this question without giving the Asbestos Claimants an opportunity to test the truthfulness of the parties on cross examination.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion For Summary Judgment is hereby denied. It is further

ORDERED, ADJUDGED AND DECREED that a continued pretrial conference is scheduled for September 8, 1992 at 1:30 p.m. in Courtroom A, 4921 Memorial Highway, Tampa, Florida.

DONE AND ORDERED at Tampa, Florida, on the 25 day of August, 1992.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

No. 93-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALVIN T. ADAMS, SR., *et al.*,

Petitioners,

v.

WALTER INDUSTRIES, INC., *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners answered the bulk of respondents' arguments in the petition and will not reiterate those arguments now. However, a few matters raised for the first time in respondents' opposition require response.

First, respondents argue that certiorari is improper here because the legal standards governing the Seventh Amendment right to jury trial are settled and this case represents only an application of those standards to particular facts. Brief in Opposition ("Opp. Br.") at 8-9. If respondents were right, the Court would not have granted certiorari in the numerous jury trial cases decided since it settled on the jury trial standard in *Curtis v. Loether*, 415 U.S. 189, 194-196 (1974). *See, e.g., Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990);

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987). As these cases show, the Court's task does not end when it settles on a legal standard to use in determining whether a constitutional right has been violated. In the long-established tradition of common law case-by-case decisionmaking, it is ultimately for the Court to correct conflicts between the courts of appeals concerning whether there is a right to a jury trial for particular causes of action. The question whether there is a right to a jury trial in the many veil-piercing cases brought in the federal courts, like the questions whether there is a right to a jury trial in a duty of fair representation case or in a fraudulent conveyance case, *see Teamsters v. Terry* and *Granfinanciera, supra*, should be decided by the Court.

Second, respondents say that review by certiorari is improper here because: 1) the Court of Appeals' failure to write an opinion leaves uncertain the basis on which it denied mandamus; and 2) it would be improper to remand and require the Court of Appeals to explain the basis for its ruling. Opp. Br. at 7-9. Respondents' argument is an open invitation to the lower courts to evade review of their decisions by failing to write opinions. If their argument were accepted, the Court could never review a decision in which the lower court failed to issue an opinion because the basis for the decision would almost always be uncertain. That is not and can not be the law. If a case presents certworthy issues, as this case does no matter what ground the Court of Appeals rested its decision on, certiorari is proper. *See Taylor v. McKeithen*, 407 U.S. 191, 195 (1972) (Rehnquist, Burger and Powell, JJ., dissenting) ("[w]hile an opin-

ion from the Court of Appeals fully explaining the reason for its reversal of the District Court would undoubtedly be of assistance to our exercise of certiorari jurisdiction here, it is by no means essential"). Alternatively, the Court can summarily grant certiorari, reverse and remand with instructions for the Court of Appeals to explain the basis for its decision. *Taylor v. McKeithen*, 407 U.S. at 194.

Third, respondents argue that petitioners' characterization of the *Larned* class action below as one involving veil-piercing rather than a personal injury claim establishes that this case seeks equitable relief rather than damages. Opp. Br. at 13-14. *Larned* is not, of course, the proper measure of whether the relief respondents seek here, precluding any claim for damages against Jim Walter Corporation ("JWC") based on veil-piercing, is legal or equitable. *See* Petition at 21 n.13. Because this declaratory judgment action will preclude all damages claims against JWC based on veil-piercing, including the *Cimino* class action and hundreds of individual tort suits, it is legal in nature even if it will also preclude some equitable claims. All of respondents' eloquence about *Larned* cannot change the fact that if they prevail in the adversary proceeding no plaintiff will be able to pursue a claim for damages against JWC based on veil-piercing. Hundreds of legal suits for damages in which jury trials were demanded cannot be resolved in a non-jury trial simply because the defendant sues for declaratory relief that he is not liable. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

In any event, saying that *Larned* involves a veil-piercing claim does nothing to answer whether there is a right to a jury trial on such claims. Like this

case, *Larned* was a declaratory judgment action, and one must look to the claim that would have been brought absent the declaratory judgment remedy to determine whether the relief sought there is legal or equitable. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988). In the absence of the declaratory judgment remedy, the veil-piercing allegations in *Larned* would have been resolved in *Cimino* and the hundreds of individual tort actions seeking damages against JWC on a veil-piercing theory. *Larned* thus involves legal relief, as does this adversary proceeding.

Fourth, respondents rely on *Dr. Salmon v. The Hamborough Company*, 1 Ch. Cases 204 (1671), to argue that veil-piercing was equitable in pre-1791 English law (Opp. Br. at 17-19) but ignore that *Dr. Salmon* had application only when a corporation had the power to make assessments on its shareholders. *See* Petition at 18 n.12. The leading English and American authorities agree that the omission of the power to assess shareholders in later corporate charters, intended to avoid the result in *Dr. Salmon*, left that case a nullity. *See* P. Blumberg, *The Law of Corporate Groups: Tort, Contract and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 1.03.1 at 13 (1987); L. Gower, *Gower's Principles of Modern Company Law* 26 (4th ed. 1979); 8 W. Holdsworth, *A History of English Law* 204-05 (1926). In any event, the ability of a creditor to have a court compel a corporation to enforce obligations of the shareholders to the corporation, as in *Dr. Salmon*, has nothing to do with modern veil-piercing, which makes shareholders liable

for the corporation's obligations regardless whether they have unsatisfied obligations to the corporation.

Finally, respondents for the first time cite *Naylor v. Brown*, Rep. Temp. Finch 83, 23 Eng. Rep. 44 (1673), for the proposition that English equity courts "imposed trusts on shareholders who had taken corporate dividends or capital in fraud of creditors." Opp. Br. at 19-20. Respondents misread *Naylor*. The Court imposed no trust there. Instead, two trusts of corporate assets had been declared for the benefit of two groups of shareholders, one by a trustee of the corporation and one by the corporation itself, without making any provision for the corporation's creditors. *Naylor v. Godfrey*, 73 S.S. 55, 56 (1674).[1] The Court held that the trust declared by a trustee of the corporation was invalid because "a trustee of a corporation or other person cannot declare in favour of private members or of a stranger unless the corporation or the trustor join in the declaration, which here they did not." *Id.* Because the trust was invalid, the money had to be returned to the dissolved corporation and was therefore available to repay the corporation's creditors.[2] *Id.* However, the Court held that

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[1] This is a different report of *Naylor v. Brown* which provides a fuller version of the decision. *See* D. Jenkins, *Skimming the Pantomime Horse: Two Early Cases on Limited Liability*, 34 Cambridge L.J. 308, 308-09 (1975). The citation is to Volume I of the Selden Society's collection of *Lord Nottingham's Chancery Cases* (D.E.C. Yale ed. 1957).

[2] The Court went on to hold that the shareholders, who were also creditors, were subordinated to the non-shareholder creditors "on the ground of fairness." D. Jenkins, *Skinning the Pantomime Horse*, 34 Cambridge L.J. at 311. The judge was, however, "not very confident that his decision was sound; his final ruling [in a later decision in the same dispute] was: 'let

the other trust for corporate shareholders was valid because the corporation had joined in the declaration of trust notwithstanding that "otherwise it seemed to me a fraudulent proceeding like that of a bankrupt who, forseeing he shall break, pays what friends he likes best." *Id.* In short, the case turns on the "technical ground[]" that the corporation had not joined in one declaration of trust for shareholders but had joined in the other. D. Jenkins, *Skinning the Pantomime Horse*, 34 Cambridge L.J. at 310. If anything, the case establishes that equity courts would *not* interfere when a corporation distributed its assets to shareholders without providing for creditors so long as the technical formalities were observed.

The other citations respondents rely upon for the equitable origin of the "corporate trust fund" doctrine are 19th-century American authorities. Opp. Br. at 19 n.8. They say nothing about whether the doctrine was recognized by the English equity courts before 1791, the question relevant to the jury trial issue.

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the decree be confirmed to the end that the cause may come before the Parliament by appeal, where the example of this case will be fit to be considered.'" *Id.*, at 311-12, *quoting*, *Brown v. Naylor*, 73 S.S. 419 (1676). Whatever the merits of the judge's decision to subordinate the shareholder-creditors, it has nothing to do with imposing trusts to recover corporate assets from shareholders, the point for which respondents cited *Naylor*.

The petition for a writ of certiorari should be granted to resolve the conflict in the circuits on the recurring question whether there is a right to a jury trial in an action seeking to pierce the corporate veil and to resolve the conflict in the circuits on the availability of mandamus to review denials of the right to jury trial.

Respectfully submitted,

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